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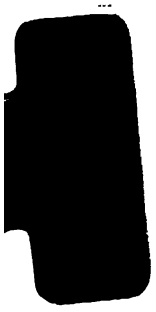

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MINES AND MINING

A COMMENTARY ON THE LAW OF

MINES AND MINING RIGHTS

BOTH

COMMON LAW AND STATUTORY

WITH APPENDICES

CONTAINING

THE FEDERAL STATUTE AND THE STATUTES OF THE WESTERN STATES AND TERRITORIES RELATING TO MINING FOR PRECIOUS METALS ON THE PUBLIC DOMAIN

AND

FORMS FOR USE IN APPLICATION FOR PATENT AND ADVERSE SUITS

BY

WILSON I. SNYDER

OF THE UTAH BAR

IN TWO VOLUMES

VOLUME II

CHICAGO

T. H. FLOOD AND COMPANY

1902

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MINES AND MINING.

PART XI.

EXTRA-LATERAL RIGHTS — (CONTINUED).

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§ 821. Preliminary — Classification the better plan.— It is our purpose in this chapter to attempt a classification of the apex cases. We believe that the intent of the law-making power can be best ascertained by grouping together in series, with the appropriate distinctions, all the apex cases, singling out the distinguishing characteristics and arranging them in classes by analogy, assigning each particular case, where it does not exactly fit the class, to such class as it more nearly fits by analogy.

As we view the matter, it would be an incongruous state of affairs, after upwards of twenty-three years of litigation

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in the different courts where they have been called upon to decide controversies involving the apex question, if the basis for some system of classification had not been evolved. Following cases by analogy is better than exploring new fields.[1] If courts cannot give to the miner all that he seeks to obtain by his location, owing to the fact that it is imperfectly made, they can at least accord to him the utmost which, under the imperfect mode of making his location, the law will admit of. As was said by the supreme court of the United States: "The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute."[2]

§ 822. Same subject — Value of general principles as controlling. — Pursuing the line of thought adverted to in the preceding section, it is obvious that the elastic principles of the common law must be applied in the interpretation of these statutes; that is to say, no violence should be done to the acknowledged canons of construction; but so far from this statute being construed in derogation of the common law, it should rather be construed as a remedial statute; and as such the familiar principles should be followed, namely, by inquiring as to what mischief existed in the old law, which was sought to be corrected, and what means were employed for its correction? And the means should be applied to the end, and the principle of liberal construction observed; that is to say, the remedy advanced, even though it be in derogation of the common law.[3] And in doing this, we believe a better solution of all difficulties can be attained by grouping all apex cases under as few heads as possible, than that each case shall stand upon its own four legs. By this means the first and most laborious feature of the case

[1] Iron Silver M. Co. v. Murphy (Iron Mine v. Loella Mine), 3 Fed. Rep. 368, 369; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 273, 281.

[2] King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222, 228; Fitzgerald v. Clark, *supra*.

[3] Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260; Black, Interp. Laws, p. 307.

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will be to determine to what class it belongs. Its solution then becomes comparatively easy.

This guiding principle was thus early stated by Judge Hallett: "Courts usually try to find out the correct principle upon which a cause should be decided, and when once, after some attention to the subject, they have arrived at a conclusion as to the rule which shall be observed in any cause, it is regarded as a decision which may be followed in subsequent actions of the same character."[1]

Applying these rules to the matter in hand, we shall find our difficulties materially lessened by the classification we have suggested.

§ 823. Same — The perfect location. — From what we have attempted to demonstrate in these pages, it must be quite apparent that a perfect location, that is to say, one made in the form of a perfect parallelogram with the apex and strike of the vein crossing both end lines, presents no question for consideration and opens no field for discussion or contention, except in a case presenting the broad-vein theory, as suggested in the preceding article, and those cases presenting for consideration cross-veins, spurs and offshoots, as hereinafter considered. The cases which have engaged the attention of the courts are those where the location, generally from want of knowledge of the actual course and strike of the vein, or haste in making the location, or both, has not been correctly laid along the strike of the vein, so as to completely cover the apex thereof. The other condition, presenting substantially the same question, when the facts are ascertained, is the one where side lines become end lines. We will therefore present these two questions together in our detailed classification. The matters thus presented for consideration can be best understood by a —

§ 824. Detailed classification of apex cases, division of the questions involved, and an illustration of the matter by drawings. — We shall find it convenient, therefore, to discuss the different questions under different heads; and

[1] Iron Silver M. Co. v. Murphy, 3 Fed. Rep. 368, 369.

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First. The perfect location, where the vein crosses both end lines.

Second. Its perfect cognate, with positions of the lines reversed, where the side lines become end lines. These questions will be considered together.

Third. Cases presenting the question of veins crossing an end line and a side line, with the extent of extra-lateral rights acquired thereby, and its effect upon the rest of the claim.

Fourth. Veins crossing one line and another not parallel therewith, as where end lines of a claim are not parallel, or where the claim consists of a group of locations, including a full consideration of the result of so grouping. The third and fourth subdivisions will be considered together, being essentially analogous in principle.

Fifth. Veins crossing the same line twice, or whose known apex begins and ends within a claim.

Sixth. Cases where extra-lateral rights are abridged or denied, and the reasons therefor.

Seventh. The effect and result of amending locations before patent and placing the lines thereof upon patented ground. And first —

§ 825. **Of the perfect location.**— As elsewhere said,[1] the perfect location, providing the apex is entirely within the claim, or the substantial and controlling part thereof so within it, and where the apex crosses both end lines and there are no spurs, offshoots, cross or intersecting veins, the facts being ascertained, presents absolutely no question for adjudication. The rights of the owner of such a vein are simple, plain and easy of ascertainment, and cannot possibly present any question for solution. He has the right to follow the vein so found on its downward course or dip endlessly between the planes made by the end lines of the location extended in their own direction and produced through the dip of the vein.[2]

[1] *Ante*, § 823.

[2] R. S. U. S., § 2322.

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§ 826. The same principle involved, positions reversed, where side lines become end lines — The Flagstaff case.— Since parallelism of end lines is essential only for the purpose of circumscribing the rights of the claim owner on his vein as he proceeds to the depth, and since it is well settled that the purpose of the statute is only given full force and effect when the claim owner is given the same number of feet of the dip of the vein, wherever it may go, that he has of the apex,[1] it becomes too plain for contradiction or question that when two parallel lines are so crossed by the vein, no matter what name the miner has bestowed upon them in making his location, the law will denominate them as end lines, beyond which he will not be permitted to pursue the vein on its strike in either direction, and only between which lines continued in their own direction will he be allowed to follow it on its dip.

An illustration of this principle is found in the very case where it was first announced, and is shown by the diagram on page 716.

The vein in dispute was conceded to have its apex in the Nabob claim and extended thence easterly into the Virginia, crossing both side lines of the Flagstaff, and continuing into the South Star and Titus, or as it was known in the case, The Titus No. 2 claim, which lay northerly of the Virginia and conflicted with it. The ore bodies in dispute are represented as being between the tunnel level and the third level as shown by the lines on the map; the dip being northeasterly.

Mr. Justice Bradley, in marking out the rights of the parties under such a location, laid down the law which has been followed without cavil or criticism, in the following words: "It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow

[1] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 549; Leadville M. Co. v. Fitzgerald, 15 Fed. Cas. 98, No. 8,158, 4 M. R. 385; Doe v. Waterloo M. Co., 54 Fed. Rep. 935.

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the strike of the vein outside of his side lines. That would subvert the whole system songht to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have prop-

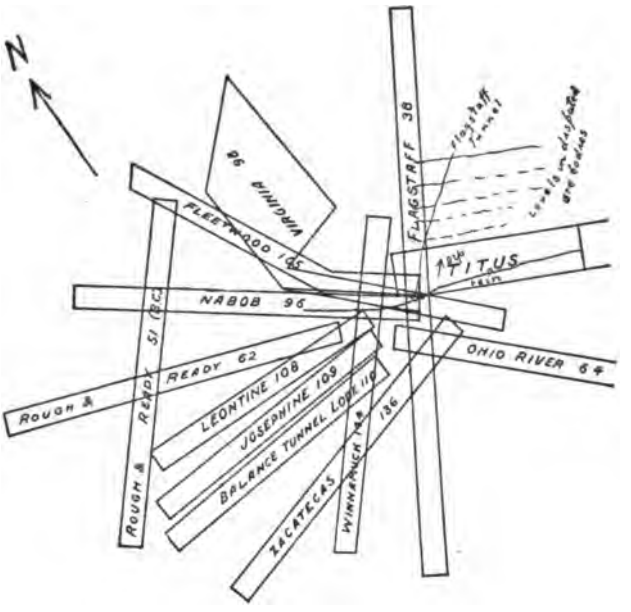

Fig. 15.

erly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins. The location of the plaintiffs in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of their claim, considering the direction or course of the lode at the surface. As the law stands, we think that the right to follow the dip of the vein is bounded by the

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end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface."[1]

§ 827. Same subject — Side lines becoming end lines — Angle of crossing immaterial — The Amy case. — The law as declared in the last preceding section has been followed without deviation by all the courts since it was announced. It matters not at what angle the vein crosses these parallel lines, the result is the same. It is sufficient that it crosses them, and the angle is quite immaterial.

Judge Hawley attempted to argue away the force of this decision in one case by laying down the dictum that where a vein more nearly conformed to the side than its end lines in its strike and course through the claim, those lines should still remain side lines, and that end lines, or new ones parallel therewith, should be made.[2] And while there might be a case, as we shall see hereafter,[3] where the apex of a vein appears to begin and end wholly within a claim, its continuation in either direction being incapable of absolute demonstration, owing to the shattering of the country by a fault, or by erosion, or from any other cause, which is clearly shown, where such a rule ought to be applied, it is quite manifest that the ordinary case of the vein crossing both side lines of the claim, thus constituting them end lines, presents no such question.

Miners must mark their locations correctly or suffer the

[1] Flagstaff M. Co. v. Tarbet, 98 U. S. 463. See also Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. Rep. 910; King v. Amy & Silversmith M. Co., 152 U. S. 222; Last Chance M. Co. v. Tyler M. Co., 167 U. S. 684; Cons. Wyoming G. M. Co. v. Champion M. Co. (C. C.), 63 Fed. Rep. 540; New Dunderberg M. Co. v. Old, 79 Fed. Rep. 598; Cosmopolitan M. Co. v. Foote, 101 Fed. Rep. 518; Tombstone M. Co. v. Way Up M. Co. (Ariz.), 25 Pac. Rep. 794; Parrott S. & C. Co. v. Heinze (Mont.), 64 Pac. Rep. 326.

[2] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 549.

[3] *Post*, this chapter, article C.

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consequences. As was said by the supreme court of the United States: "If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein and draws his end lines ignorantly, he must bear the consequences."[1]

And again: "The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines, and such end lines as side lines; but the court cannot make a new location for him and thereby enlarge his rights. He must stand upon his own location and can take only what it will give him under the law."[2]

The force of the observations presented in this section can be better illustrated by a reproduction of one of the maps used in the case and referred to in the opinion by the supreme court of the United States.

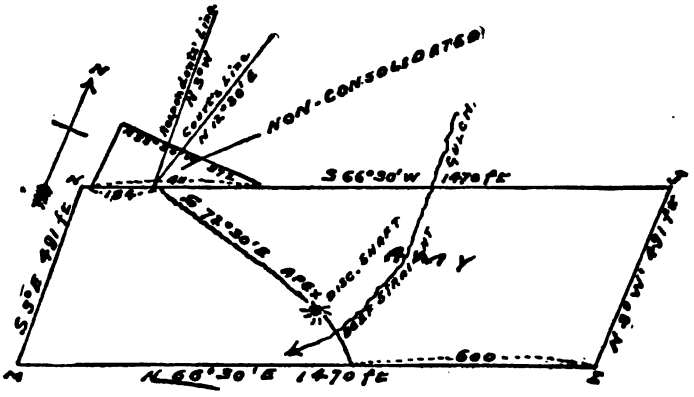

Fig. 16.

[1] Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196, 207, 30 L. ed. 98, 102.

[2] King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222, 38 L. ed. 419.

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The ore bodies in dispute lay beneath the surface ground of what is called the "Non-consolidated." The Amy claim was fourteen hundred and seventy feet long by four hundred and ninety-one feet wide. The strike of the vein was northwest and southeast, crossing the southerly side line six hundred feet west of the easterly end thereof, and the northerly side line one hundred and eighty-four feet east of the westerly end line thereof. The trial court granted extra-lateral rights coterminous with a line at right angles with the strike at the point of departure from the claim. The supreme court of Montana modified this by projecting a new end line into the dip parallel with the westerly end line at the point of departure. What the court was going to do at the other point of departure it did not decide; that is to say, whether it was going to create a new end line there, or call the intersection of the southerly side line with the vein, as it crossed the same, the apex *pro hac vice*.

It was fortunate in the interest of settled law and titles to mining property that the supreme court of the United States was not affected by the same hallucination as either of the Montana courts, and that it left the case where its distinguishing features placed it, as one where the side lines became end lines, and as such, were drawn vertically, thus cutting off further pursuit of the vein except between those lines extended in their own direction.[1]

§ 828. The effect of such a location as to extra-lateral rights — Pursuit of the vein on its dip beyond the located end line.— There has been considerable argument at the bar, and opinions expressed by lawyers well versed in mining law, that the real end lines of a location, that is to say, the shortest lines, were drawn vertically in every case and under all circumstances, and this upon principles of estoppel. No court, however, has ever gone to the length of so deciding.[2]

[1] *Ante*, § 826; Parrot S. & C. Co. v. Heinze (Mont.), 64 Pac. Rep. 326.

[2] See the dictum of Hayt, C. J., Catron v. Old, 23 Colo. 433, 48 Pac. Rep. 687, 689.

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Judge Hawley in a recent case,[1] in following the doctrine which has become settled law ever since the Colorado Central cases,[2] and which no lawyer will dispute, decides that the end lines of the claim, whether they be side lines or end lines in fact, that is to say, those crossed by the vein located, are the end lines for all purposes, and this notwithstanding a cross-vein, spur or offshoot may dip nearly at right angles with the main vein and so pass under such line on its dip.

There can be no possible dispute as to the correctness of this position as a general rule, as we shall elaborate further in another part of this work,[3] but that falls far short of deciding this particular question. So far as we have been able to ascertain, however, from a diligent search of the cases, there is but one case deciding this precise question. This case arose in Connecticut between the plaintiff, a Maine corporation, and the defendant, a Connecticut corporation, upon a contract in relation to mining in the neighborhood of their common boundary, their mines being situated in the territory of Arizona. It appears that the end lines of their claims joined, and the defendant owned a vein apexing on its own land, crossing both located side lines on its strike and descending in its downward course or dip beneath the claim of plaintiff. Said vein on its dip crossed the end lines of defendant's location and penetrated beneath plaintiff's location by crossing the boundary line of the two claims, the common end line of both, so called. Defendant was under contract to explore and open plaintiff's property through its workings, and it was provided, *inter alia*, in the contract, that defendant should account to plaintiff for the ores mined. Defendant refused to do so upon the ground that the ore mined apexed in its own land, and consequently was its property. The suit being upon the contract, this was the material question involved in the case.

It was contended on the part of the plaintiff that the side

[1] Cosmopolitan M. Co. v. Foote, 50 Fed. Rep. 888; s. c., 54 Fed. Rep. 662, 70 Fed. Rep. 294. 101 Fed. Rep. 518.

[2] Colorado Central M. Co. v. Turck,

[3] *Post*, ch. III, art. C, this Part.

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lines becoming end lines had the effect to make four vertical planes, beyond which the defendant could not go in pursuit of the vein on its dip. In other words, it was denied extra-lateral rights altogether. While the defendant contended that, inasmuch as the decisions had been to the effect that in such case the side lines became end lines, and end lines side lines, in other words, that, the position of lines being reversed, the rights were not otherwise affected.

The court, in adopting the theory of the defendant as the law, takes the following language from the supreme court of the United States: "The course of this vein is across the Last Chance claim, instead of the direction of its length. Under those circumstances the side lines of that location become the end lines, and the end lines the side lines."[1] And again: "When a mining claim is located across instead of along the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Revised Statutes of the United States, section 2322, the dip cannot be followed outside the vertical plane of the original side lines into an adjoining claim."[2]

The court decided that the position of the supreme court of the United States in those cases and others was decisive of the case and sustained the defendants' theory thereof.[3]

To us this seems altogether logical, and that it is in hearty accord with the spirit as well as the letter of the law. Any other rule would be judicial legislation, and by that means deny to the mine owner what the statute plainly gives him — the right to follow his vein endlessly on its downward course, provided he does so between parallel planes,

[1] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. See also Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; King v. Amy & Silversmith M. Co., 152 U. S. 222.

[2] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 547.

[3] Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. Rep. 910. See also Walrath v. Champion M. Co., 171 U. S. 293; Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196; Del Monte M. & M. Co. v. New York & Last Chance M. & M. Co., 171 U. S. 55.

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drawn within the boundary of his own location at the surface, and containing the apex of the vein within his own ground, and by extending such lines so as to include such outside parts.

Article B.

Veins Crossing Lines Not Parallel, and Herein of End Line and Side Line Veins, and of Group Claims.

§ 834. End and side-line doctrine — Preliminary observations.
835. The decisions of the circuit courts on the question presented by a vein crossing a side line and an end line, and the equitable features presented.
836. Effect of location and discovery on the dip of the vein where apex crosses side line and end line.
837. End line and side-line cases — The equitable reasons of the rule as originally considered in the Del Monte case.
838. The case of Fitzgerald v. Clark — Reason of the rule — A correct result by reasoning partially right and partially wrong.
839. Criticism of the Clark-Fitzgerald case.
840. Wyoming v. Champion — Ideal or imaginary location of veins along center of claim not conclusive — End line and side line — What a vein under the statute.
841. Further as to what is a vein — Flat or bedded veins.
842. The Wyoming-Champion case — Circumstances of the case compared with other cases by the court — True construction of the statute — Particular line or angle of crossing immaterial — Patents and rights under law of 1866 considered.
843. Walrath v. Champion — Law of 1866 — Relation of other veins in claim to located vein — Other veins crossing side line — End line for one, end line for all — One set of end lines.
844. Comments and criticisms of the Wyoming case — Classification the safer plan.
845. Further comments of the court which sustain us throughout in the position sought to be taken.
846. No force in suggestion to postpone marking.
847. New but progressive statement of the law.
848. Further comments to matters in last section — Dangerously near the old law.
849. Irregularly-shaped locations consolidated in one patent.
850. Same question — The Carson City case.
851. Original location lines immaterial — Doctrine of Doe v. Sanger.
852. Claims patented separately and consolidated, grouped and operated as one mine after patent.
853. The doctrine of this article summarized.

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§ 834. End and side-line doctrine — Preliminary observations.— The principle involved in this branch of our inquiry is far more difficult of solution than any with which we have had to contend. The courts seem to have reached an equitable rule here, not within the letter but clearly within the spirit of the statute. As we have elsewhere said, it is manifestly the intention of the law-making power to give the first locator as great a quantity of his vein throughout its entire depth, in its course downward, as he possesses of its apex. And it would seem equally clear, that where a vein or lode crosses a side line after having crossed an end line, the former in the direction of the apex, he would be restricted to the same rule which would control him if the vein should depart from the side lines solely in the direction of the dip, as he would if he made a discovery in the first instance on the dip instead of on the apex; in other words, it can make no difference which way the vein passes out, whether towards the apex or the dip, the same rule must apply, unless, following the principle laid down by Judge Hallett in one case,[1] he will occupy the same relation to the portion of the lode to which he has no apex, but has the dip beyond the point where it passes over his side lines on the strike, as he would if he made his discovery upon a segment of the dip. However, we will reserve the further discussion of this subject until we have presented —

§ 835. The decisions of the circuit courts on the question presented by a vein crossing a side line and an end line, and the equitable features presented.— An able and intelligent discussion was made of this question by Hawley, District Judge, in the celebrated Tyler-Last Chance case. This was an action originally commenced with the view of determining the right of property in a body of ore lying under the Last Chance surface which the Tyler company claimed to own. The Last Chance claim was a claim sim-

[1] Van Zandt v. Argentine M. Co., 2 McCrary, 159, 8 Fed. Rep. 725.

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ilar in its relation to the strike of the vein to the Flagstaff and Amy, but the Tyler presented an entirely different question. It was tried wholly on the apex theory, and was so decided in the first instance; but in the treatment it has received at the hands of the courts since, owing to the element of *res judicata* involved in it, it has been discussed on almost every other ground than apex, having been finally decided upon the sole question of a former adjudication as to the priority of location, which was held to be necessarily included in a consent judgment in an adverse suit, and which was referred to when we considered that question. Here the location of the Tyler was properly made in the form of a parallelogram along the course of the lode or vein. The lode extends from the northwesterly end line for a distance of nearly eleven hundred feet within the side lines of the surface location, and then so changes its course as to cross the northerly side line of the Last Chance location. The Last Chance was likewise well located in the form of a parallelogram, but crosswise of the vein, as intimated above, so that its side lines became end lines. The subject will be better understood by reference to the following diagram:

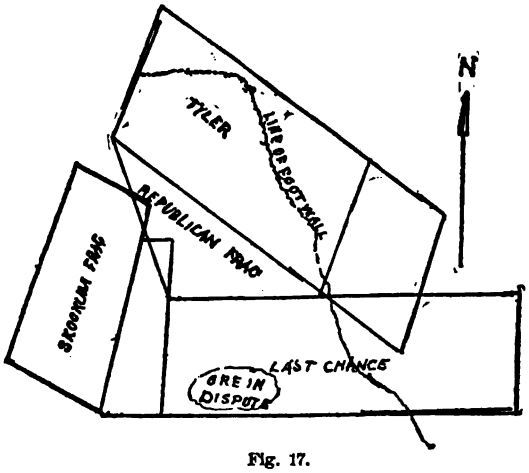

Fig. 17.

It will be observed that the ore body is under the surface of the Last Chance, and if the owner of the Tyler claim has

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the right to follow the ore on its dip beyond its side line, the owners of both claims could lawfully reach the same body of ore, and the ownership would have to be determined by priority of location. This, of course, was an important element in the adverse suit, and its determination there was conclusive. But we have already considered that question, and a further examination would be a useless digression.

In the circuit court Judge James H. Beatty held that the respective dates were conclusively settled by the adverse suit, and a verdict consequently resulted in favor of the Last Chance.

In the circuit court of appeals, where Judge Hawley rendered the opinion, it was held that this fact was not a controlling element in the decision in the adverse suit, and the question as to whether the Tyler was so located with reference to the Horseshoe case[1] as to authorize the pursuit of the vein on "its downward course" beyond the side lines of the claim was the decisive one.

This was the first case before the courts involving the question of a vein passing through an end line and a side line (two lines not parallel) of the claim, and the superficial thought urged against extra-lateral right in such case was that, under the Flagstaff decision,[2] any side line crossed by a vein on its strike must be construed as an end line and be drawn vertically through the vein. An examination of the Flagstaff case, however, shows that it decides no such thing, only that parallel lines shall be so considered. In reasoning upon this feature of the case, Judge Hawley held that the Tyler was so located as to possess extra-lateral rights upon either of two principles:

(a) If the vein had abruptly terminated before reaching an end line after crossing one, there could be no question

[1] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196, 30 L. ed. 98; s. c., 14 Fed. Rep. 877.

[2] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253.

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but that extra-lateral rights parallel with the end line at the point of termination would, upon the most obvious principles of justice, be awarded; or

(b) The end line not reached could be drawn in towards the other to meet the point where the vein either terminated or crossed a side line, if that were important, and dip rights given accordingly.[1]

The court cites several cases supporting the principle of properly adjusting lines to cover such a case.[2] It is proper to say that the last two cases are scarcely in point; but, independent of that, and upon the intrinsic strength of the reason of the law as applied by the court, the decision becomes firmly and unassailably entrenched, and, *a fortiori*, as decided by the United States supreme court, prescribing lines beyond which a vein may not be pursued on its strike, falls far short of saying that the right to follow the vein on its dip is not granted unless the vein on its strike reaches such lines.[3]

§ 836. Effect of location and discovery on the dip of the vein where apex crosses side line and end line.— We intimated in a previous section,[4] and such would seem to be the effect of Judge Hallett's decision, that where a discovery was made upon the dip, there could be circumstances where such discovery and location would be good as against one subsequently made upon the true apex outside of the claim. But in such case, we take it, there must be an actual instead of assumed discovery, and discovery and work upon the identical segment of the vein. To illustrate this, let us repro-

[1] Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284, 4 C. C. A. 329.

[2] King v. Amy & Silversmith Cons. M. Co., 9 Mont. 453, 24 Pac. Rep. 200; reversed, s. c., 152 U. S. 222; Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 13 Nev. 313; Kahn v. Old Telegraph M. Co., 2 Utah, 174.

[3] Del Monte M. Co. v. New York & Last Chance M. Co., 171 U. S. 55, affirming s. c., 66 Fed. Rep. 212.

[4] See *ante*, § 834; Van Zandt v. Argentine M. Co., 2 McCrary, 159, 8 Fed. Rep. 725.

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duce a figure from the geological preface of a late work on mines.[1]

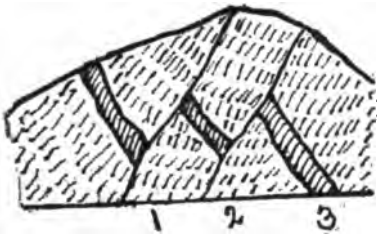

Fig. 18.

Here is a case where the true apex comes to the surface, but the vein is twice faulted. Let us suppose that sufficient ore is dragged into the fault-planes to preserve a continuity, or that there are such distinguishing features in the hanging or foot-wall as to preserve the identity of the vein in the third segment with that in the first and second. Now, suppose again, that locations are spread upon this ground in the manner shown in the subjoined figure.

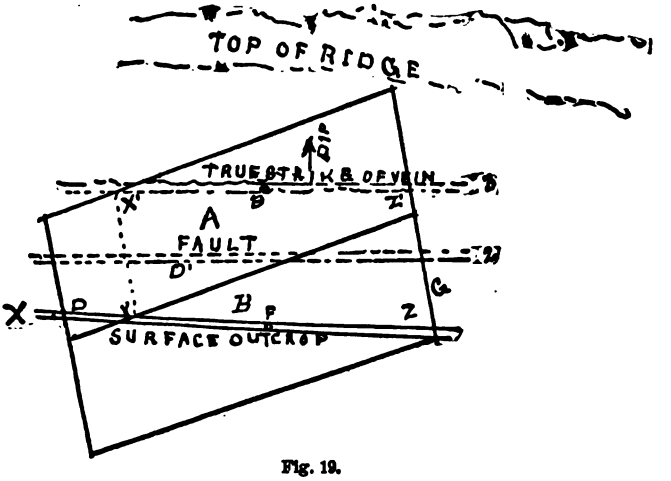

Fig. 19.

Let the solid lines 1 represent the true apex, as shown in the last preceding figure; let the dotted lines 2–3 represent

[1] Barr. & Ad. Mines, Geological Preface, civ.

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the segments of the vein shown in segments 2 and 3 of the cross-section of the mountain. Manifestly, that portion in 3 is the valuable one, it going to the deep. Now, suppose that A.'s location is the older, and is made upon a discovery at the points D, D′ D, or D alone on claim "A." Suppose, also, that by underground workings, prior to the location of B.'s claim, he has developed the vein and shown its existence at X′ and Z′. True, his main vein, the one which furnishes the apex, has departed from his side line at Y. If he has actually discovered and worked X′ and Z′ before B. makes his discovery at F, why will he not have the better title to said ore? On the other hand, suppose that the positions are reversed, and B. makes the discovery at F before A. makes the discovery at X′ and Z′, why will he not have the better title? It must be remembered B. has the only outcrop. Again, supposing that B.'s is the older location, can there be any question but that, upon proof of the identity of the three veins, B. will own, by virtue of his discovery at F, all the ores in X′ and Z′ contained within the planes of his end line G with a parallel line at Y, the arrow marking the direction of the dip. Precisely these questions do not seem to have ever reached a court of last resort, nor to have been considered by any court except as intimated by Judge Hallett in the case above mentioned in this section. It may never arise. If it should, it seems to us that the position we have indicated is the only correct one.

We digressed in this section to take up the question of locations upon the dip. We were led to this by the thought, which some of the attorneys in the Last Chance case say is a fact, that the Last Chance was really after all located upon the dip. If the rule which controlled the court in Duggan v. Davey had been applied, the question of priority would not have been so important, because a location upon a dip exposure gives no extra-lateral rights, and the location of the Tyler upon the apex of the strike would own the ores.

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§ 837. End line and side-line cases — The equitable reasons of the rule as originally considered in the Del Monte case.— The next case to present the question of end and side-line departure of the vein from the claim was the Del Monte case[1] in Colorado. It will be best understood by the following diagram:

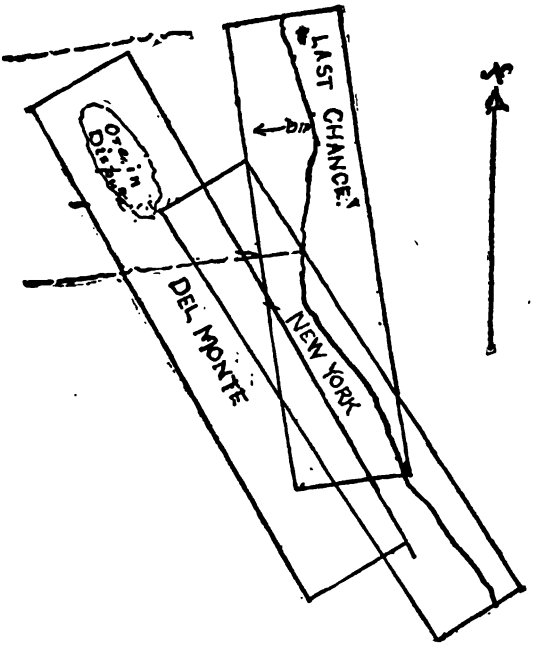

Fig. 20.

The relative dates of location of these claims were, first, the Del Monte; second, the New York, and the Last Chance was the junior. It will be observed that the Del Monte possesses no apex. It was contended by the Del Monte company, the same as in the Tyler-Sweeney case, that all lines crossed by a vein on its strike were drawn vertically against it, and the absurd assertion was made that this was the ruling in the Flagstaff case. Judge Hallett, in disposing of this feature of the case when it was before him at the

[1] Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212.

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circuit, in his inimitable terseness of statement, says: "This, however, has not been the interpretation of the law in the supreme court or in any court so far as we are advised. It is true that in the Flagstaff case . . . and Amy-Silversmith case, . . . the supreme court declared that the side lines of the location shall be end lines wherever the lode on its strike crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principle of these decisions."

One end line was well placed, and in making the mistake of placing the other further distant therefrom than the point where the claim ceased to contain the lode, ought not, and the courts say did not, deprive the Last Chance owner of extra-lateral rights. Says the court: "It is said that we cannot make a new end line at the point of divergence . . . because the court cannot make a new location or in any way change that made by the parties. . . . This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extra-lateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it. . . . We keep entirely within the end lines of the location, . . . and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location."[1]

The logic of this ruling seems to us invincible, but the case itself was further reasoned upon by Mr. Justice Brewer in the supreme court of the United States, who said, speaking of the statute: "This places a limit on the length of the

[1] Del Monte M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212. See also Walrath v. Champion M. Co., 63 Fed. Rep. 552; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

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vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line but terminates half way across the length of the location; his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein 'the top or apex of which lies inside of such surface lines extended downward vertically,' and the same is true if it enters at an end and passes out at a side line."[1]

§ 838. The case of Fitzgerald v. Clark — Reason of the rule — A correct result by reasoning partially right and partially wrong.— The next case to engage the attention of the court, and before any such case had reached the supreme court of the United States, the final arbiter in such cases, was the case of Fitzgerald v. Clark, in the supreme court of Montana.[2] The case will be better illustrated by a diagram (on page 732) copied from the Pacific Reporter in its report of the case.

The plaintiff owned the Niagara and the defendants owned the Black Rock. The vein crossed the common line at

[1] Del Monte M. Co. v. Last Chance M. & M. Co., 171 U. S. 55; Clark v. Fitzgerald, id. 92, affirming s. c., 17 Mont. 100, 42 Pac. Rep. 278, 30 L. R. A. 803: Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848.

[2] 17 Mont. 108, 42 Pac. Rep. 278; affirmed, s. c., 171 U. S. 92. See also Parrot S. & C. Co. v. Heinze (Mont.), 64 Pac. Rep. 826.

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point "A," and the action was for ores mined by defendants at the point marked "ore bodies," which the plaintiff claimed in virtue of his apex ownership.

The trial court, Judge McHatton, projected an end line into the dip of the vein parallel with the end line at the

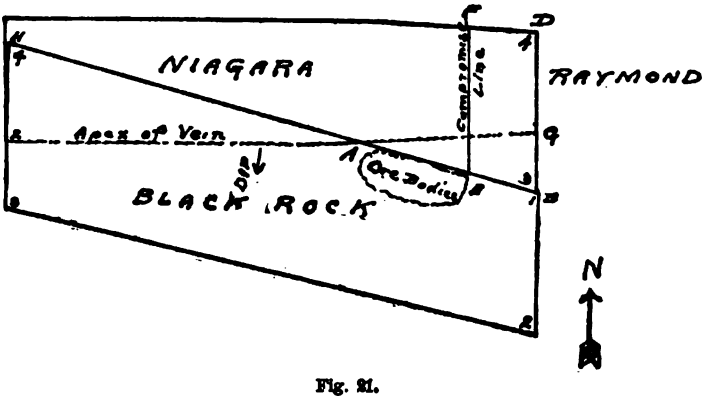

Fig. 21.

point where the apex departs from the side line of the Niagara into the Black Rock, and consequently gave the ore in dispute to the plaintiff. The supreme court affirmed the decision in a very exhaustive opinion in point of research of the cases, but an opinion which was somewhat color-blind in the matter of discrimination. Some of the reasoning was, however, exceptionally strong, and one of its reasons for the correctness of placing a new end line at the point of departure, instead of drawing all lines crossed by the lode on its strike vertically, was unanswerable. The reasons given by the court were substantially as follows: "If the side line crossed must be treated as an end line, and be drawn vertically, this will make two vertical planes meeting at right angles at the corner of the claim. If the vein dips in the direction of the side line so crossed, the application of the above rule would give the owner of the apex but a small segment of the vein; and of course if such a rule were to prevail as to such a vein, it would have to be applied to one dipping the other way, thus giving a con-

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stantly and rapidly diverging dip proceeding fan-shaped into the earth, and comprehending within its possible range an enormous segment of the vein. There are but two ways to prevent this result: either draw all lines vertically or project a new end line into the dip at the point where the vein leaves the side line of the claim. Since there is no authority to do the former, this court and other courts have wisely pursued the latter course and kept well within the spirit of the law." The court proceeds as follows: "As we leave this confusion and turn to the other solution, that of the Amy & Silversmith case, . . . difficulties disappear and there is light upon the whole path. We can, then, do, as the United States supreme court said in its decision in the Amy & Silversmith case, . . . 'The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give the miner such rights as his imperfect location warrants, under the statute;' that is to say, we can give to the miner, or rather the law, as we construe it, gives to the miner, as much length of strike, no matter how deep he goes upon the dip, as he has length of the apex, and he loses in strike and dip only what he has failed to get in apex."[1]

§ 839. Criticism on the Clark-Fitzgerald case.— We think the court was entirely right in the case last cited, and agree with much of the reasoning of the court. Not because it followed its interpretation of the Amy case, however, for we do not agree that it did follow it, but because it departed from it, and because of the reasoning of Judge Hawley and Judge Hallett quoted in the opinion, and because of the reasoning of the court, which agrees with what we have elsewhere said, viz., that it was the intent of the statute to give the miner as much of the strike of the vein on its dip as he has of its apex; no more, no less. The Montana court loses sight of the fact that the Clark case, as also all

[1] King v. Amy & Silversmith Cons. M. Co., 9 Mont. 542, 24 Pac. Rep. 200; reversed, 152 U. S. 222

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other cases of crossing an end line and a side line, rests upon a wholly different and distinct principle from the Amy case and the Flagstaff case, which must of necessity rest upon the same principle as decided by the supreme court of the United States. It will thus be seen that in the Clark-Fitzgerald case the Montana court was, in a sort of *nolens volens* way, guided by correct principles, and was not correct in the Amy & Silversmith case. It only goes to show that even the best of courts are sometimes intuitively guided by the hand of the blind goddess rather than by their own process of reasoning.

§ 840. Wyoming v. Champion — Ideal or imaginary location of veins along center of claim not conclusive — End line and side line — What a vein under the statute.— While this case could have been properly cited as authority for the same principle involved in the last section, the Del Monte, the Clark-Fitzgerald and the Tyler cases; still there are some new and unique features presented, some of which, while they are good law in the abstract, must be relegated to the field of mere dictum, not necessary to the decision of the real point involved in the case. It presents, besides the question of crossing lines not parallel, the further question as to what shall be considered the vein or lode line, the real one or an imaginary one established for purposes of survey. And further, whether the hanging wall or foot-wall is to be the line measuring the right. While the decision itself was written by one of the most able mining judges on the bench, the wide range covered by it serves to illustrate the danger, which even the best judges are falling into, of enlarging rather than reducing the mass of an opinion to a decision of the questions under discussion. In that case[1] it was decided and held what would seem to be unnecessary, yet it is undoubtedly a correct statement of the law, that mere ideal lines along the center of a location, from which all distances are measured for the purpose of a patent, do

[1] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

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not necessarily constitute the vein, nor is any person accepting such patent, or holding under it, estopped by any such circumstance or condition. And further, that that is the vein which is officially demonstrated to be the vein, no matter where it runs; and that must be the law everywhere. That, and that only, is the vein which answers the description we have tried to give elsewhere in this work of what constitutes a vein or lode. To epitomize: the vein, then, in the light of the authorities and the statute, as we attempted to point out in the chapter relating to discovery, must be held to be the mineralized sheet zone or mass in place, that is fixed where nature placed it in the body or mass of the mountain. If between plainly distinguishable walls, or between two different kinds of rock, these walls or specific character of rock will mark the margins of the vein, and the mass between will be the vein regardless of its richness so long as it shows a trace of vein matter. If the vein is one of substitution, replacement or infiltration, where the mineralized substance has eaten out and occupied the place once held by the country rock, as in some limestone regions, the entire mineralized mass must be held to be the vein, and the barren rocks on either side must be called the walls.

§ 841. Further as to what is a vein — Flat or bedded veins.— While we discussed in our chapter on discovery the question as to what constitutes a vein, and again in considering the apex, still we were properly led into a discussion in the last section as between the real vein and the wholly imaginary lode line which the clerks of the land office have required to be marked upon the diagram in applications for patent. And while we are digressing for one purpose, it will not be wholly out of place to consider another species of "irregular" vein, which some say cannot be pursued on its downward course. Much theoretical speculation and impracticable observations have been indulged by mining experts, geologists and law writers as to what rights can be acquired by location upon a bedded vein lying

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almost horizontal or folded so as to present an apex exposure either flat or inclining upward. The answer is found in the law itself. While the theory upon which the law was enacted was that veins were more or less vertical, it by no means withheld from location those veins that were not so. Since the apex is the part approaching nearest the surface, if the ore is in defined boundaries the inclination or the lack of it becomes an immaterial question, and the outcrop may be located and the vein followed on its dip. And the spirit of the law will be satisfied by allowing lateral pursuit; the discovery is upon the edge of the vein, which agrees with the court's definition of apex, precisely the same as if the stratum containing the vein stood upon its edge vertically or upon any angle between the vertical and the horizontal.

§ 842. The Wyoming-Champion case — Circumstances of the case compared with other cases by the court — True construction of the statute — Particular line or angle of crossing immaterial — Patents and rights under law of 1866 considered. — The main question in this case was the ownership of the ore existing beneath the surface of the New Year's and Climax locations, the property of the Champion company, and claimed to have its apex in the Ural location, lying westerly therefrom, the property of the Wyoming company. The imaginary or ideal strike of the vein was from the northerly end line of the Ural southward; the real strike was the margin of the zone of croppings and the line of contact of the granite hanging wall with the slate foot-wall. There were other veins dipping in the same direction and having their apex elsewhere, which united with these at considerable depth. But that question belongs properly to another branch of our inquiry.[1] The particular vein apexing in the Ural ground, by its foot-wall crossed the easterly side line of the Ural location, and it was contended as in the Del Monte, Clark-Fitzgerald, and other

[1] *Post*, ch. III, art. D.

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similar cases, that that line constituted an end line, and must be drawn down vertically, cutting off the extra-lateral rights of the Wyoming people. Judge Hawley in commenting upon the different cases presented the principles involved in the Flagstaff, Amy, Tyler and Del Monte cases (although it was before the decision of the Del Monte case, yet the same principles were involved), sustained these principles and repudiated the contention above mentioned. It was further contended that the lines were laid so that, under the decision in the Horseshoe and Argentine cases, extra-lateral rights should be denied. But the court was not misled by this sophistry, and correctly ruled that where one line is crossed by the vein on its strike substantially at right angles therewith, the angle at which the other line is crossed is immaterial, and a new line would there be drawn parallel therewith and extra-lateral rights granted accordingly.[1] The learned judge then proceeds to distinguish, as we have sought to do elsewhere, between the cases where the lode crosses an end line and a side line, and those where it crosses both end lines or any two lines running parallel to each other, or substantially parallel, and concludes as follows: "It cannot, it seems to me, consistently be said that complainant is deprived of any of its extra-lateral rights to the fourteen hundred feet, more or less, which is all entirely within the surface lines of the Ural patent, and substantially parallel with its side lines as marked upon the surface ground. The statute of the United States is not, in my opinion, susceptible of any such construction, and no decision of any national or state court has ever gone to that extent. The supreme court of the United States in the Amy case simply decided that when a mining claim is located across instead of along the lode, its side lines must be treated as its end lines, and its end lines as its side lines; . . . there is nothing in either

[1] Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. See also other branches of the litigation over the same ground. Walrath v. Champion M. Co., 63 Fed. Rep. 552, 72 Fed. Rep. 978; s. c., 171 U. S. 293, 163 U. S. 710.

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of the opinions of the circuit court of appeals in the Tyler cases which is at variance with this principle. On the contrary, this rule is expressly recognized."[1]

The court further attempted to lay down the rule that where a vein enters a claim over the side line, say five feet from the end line, and crosses the other side line a like distance from the other end, but proceeds more nearly lengthwise than crosswise of the claim, a new and different rule, similar to that of the Montana supreme court in the Amy case, should prevail, and lines be projected into the dip parallel with the end lines proper. But as this was not necessary to the decision of the case, and would subvert the entire system and open the door to hair splitting as to what cases would fall within such a rule, it is best to place it in retirement by simply saying it would be impracticable.

§ 843. Walrath v. Champion — Law of 1866 — Relation of other veins in claim to located vein — Other veins crossing side line — End line for one, end line for all — One set of end lines.— The question as to the general relationship of the located vein to all others apexing within the claim is postponed to a further part of this work,[2] but the question was discussed in the case mentioned in the heading[3] in such a way as to make it strikingly applicable to the general end and side-line question.

The matter in hand can be better illustrated by the diagram (on page 739) used in the supreme court to illustrate the decision.

Both veins dipped towards the east, and the Providence or

[1] Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. See also Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. Rep. 513; Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284, 4 C. C. A. 329; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557, 9 C. C. A. 613; Doe v. Waterloo M. Co., 54 Fed. Rep. 937.

[2] *Post*, this Part, ch. III, art. B, §§ 885–89.

[3] Walrath v. Champion M. Co., 63 Fed. Rep. 552; modified and affirmed, 72 Fed. Rep. 978, 19 C. C. A. 323; affirmed, 171 U. S. 293, 43 L. ed. 170.

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granite vein, the one located upon, crossed lines a–p and g–h substantially parallel. The contact vein, so far as involved

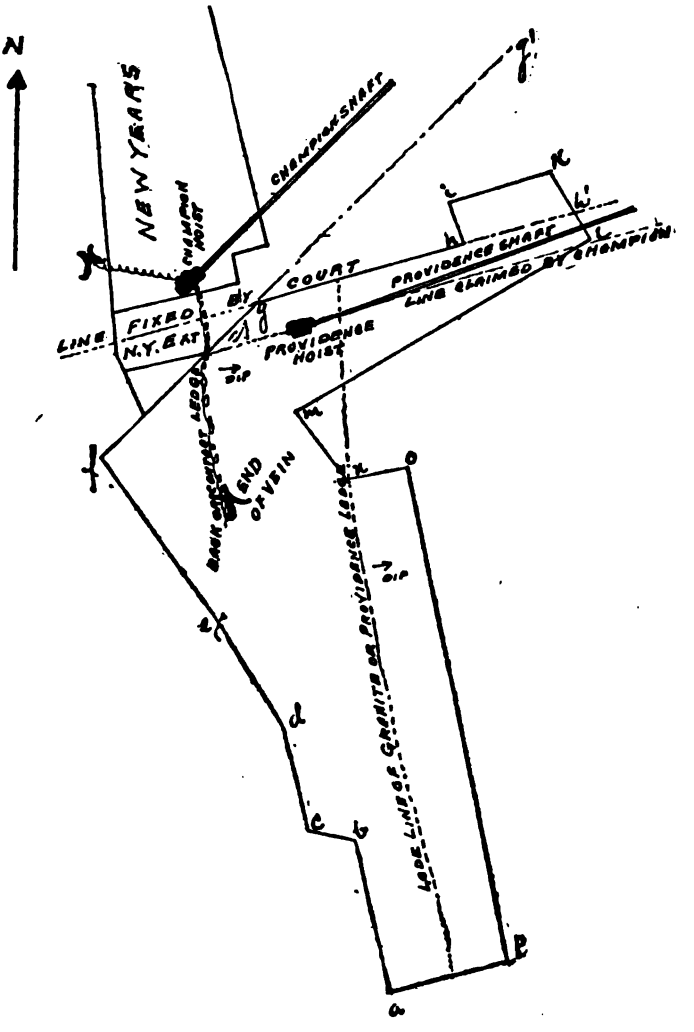

Fig. 22.

in the case, ran parallel with the main vein, and, as shown in other litigation involving the same vein further north,[1] united

[1] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

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with it at depth, also on the strike; but that is not important here.

The complainant owned the Providence claim, which was located and patented under the law of 1866, and the respondent owned the New Year's Extension (marked on the diagram "N. Y. Ext."). The general rule announced in the case, and which we may consider as settled, is that there can be but one set of end lines, which are those that control the main or located vein.[1] We take it there can be and will be no disputing the proposition that there can be but two sets of lines in a mining claim, no matter how many lines there may be, and that one set of those, composed of two lines only, must be called end lines, and all other lines must compose the other set and be called side lines. We leave out of this consideration all imaginary lines projected into the dip, as in the Del Monte, Clark-Fitzgerald and similar cases.

Starting with premises thus laid it must be apparent that the line f-g is a side line. The pertinent question then becomes: what rule is to be applied to a side vein (if we may use the expression) paralleling the main vein, and crossing such side line on its strike? If the court, whose decision is final, had not decided otherwise, we would be compelled to say, following the principle of the Del Monte and similar cases, and the exact rule of the circuit court of appeals of the ninth circuit, in the Montana case cited above,[2] that a new line parallel with the end line should be projected into the dip at the point of such departure, and the right of the Providence to the portion thereof as to which it had no apex be thus circumscribed, and the contention of the Champion company adopted. But the supreme court has decided otherwise, and consequently the law is, or at least seems to be, to the contrary, but with due deference, it is the reasoning of the judge and not the reason of the

[1] Walrath v. Champion M. Co., 63 Fed. Rep. 552; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196, 198, 30 L. ed. 98, 99; St. Louis M. & M. Co. of Montana v. Montana M. Co., 104 Fed. Rep. 664.

[2] St. Louis M. & M. Co. v. Montana M. Co., *supra*.

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law, a greater show of power than of reason, which makes it so. It is the province of the law writer to attempt a reconciliation of the law upon lines consistent with the reason of the law. Cases like this make the performance of that duty very difficult.

The logic which binds us to the end line and side line rule seems invincible, and by that we are taught that where a vein crossed an end line and side line of a claim, a line parallel with the end line at the point of departure marks the limit of the right of pursuit of the vein on its dip, these lines of course to be produced endlessly in their own direction. Why should a different rule apply to a side vein? We can see no reason therefor. But it is said, and truly too, that the end lines of the located vein are end lines for all purposes and all other veins. True, but it does not follow that all other veins are to be given the same length of strike, regardless of the ownership of apex, as the main vein. The principle will be sufficiently vindicated by applying the same rule as that applied to the main vein and drawing a line parallel with the end line at the point of departure, as was done with the Drum Lummon vein in the Montana case. Naming limits beyond which a vein may not be pursued on its strike is not the equivalent of saying that all veins, apexing in any part of the ground, may be mined on their strike to that line, regardless of the position of the apex, in or out of the ground. Besides, the apex belonged to the New Year's Extension, passing over a line parallel with the end line of the Providence, and reaching to the point where the vein on its strike passed out of the Providence. Our position can be better illustrated by reference to the diagram (on page 742) in the Montana case mentioned above.

Here the Drum Lummon vein is the side vein and the St. Louis vein is the located or main vein. Both dip in the same direction, towards the east. The only distinction between this case and the Providence-Champion case is that here the side vein is in the hanging wall, and there in the

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foot-wall of the main vein; but it is a distinction without a difference where the veins are substantially parallel.

The same rule applied to the Drum Lummon vein as that applied by the supreme court and the circuit court of ap-

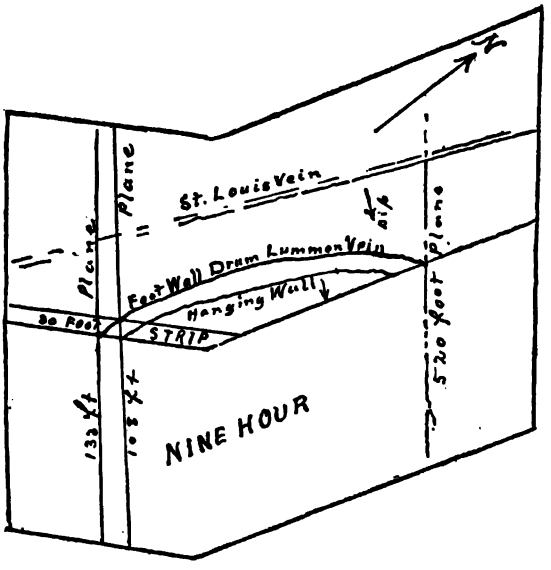

Fig. 23.

peals to the Providence contact vein would give the St. Louis the dip right upon that vein the entire length of the St. Louis claim, regardless of ownership of apex.

The further this question is pursued the more apparent does it become that the supreme court did not fully appreciate the question before it, and that it ought to modify this decision, and in such cases give to each the right on the dip coterminous with ownership of apex, the local lines always to be drawn parallel with the end lines which mark similar rights as to the located vein.

§ 844. Comments and criticisms of the Wyoming case — Classification the safer plan.— Nor can we agree with all that is said by the learned trial judge in the Wyoming case;

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we think it safer to adopt a system of classification as we have sought to do in this work, and then rigidly pursue such classification in all decisions under the statute.[1] It is true that the statute should be liberally construed as a remedial statute,[2] in order to protect the miner in the enjoyment of his rights. But this can better be done by having fixed and safe rules, than by exploring new fields and marking out new precedents every time a doubtful point is encountered in the decision of a case. We think, therefore, that wherever a lode crosses two lines running substantially parallel with each other, no matter at what angle, or at what points in the line, those lines are, by force of the statute, end lines, and, extending in their own direction, cut off his rights; that when a lode crosses an end line and a side line, a new end line should be projected into the dip parallel with the first one, at the point of departure, and that if these conditions are elevated to the position where we have sought to place them, all gloom and difficulty will vanish, and the pathway be made more easy for the interpretation of this statute. But here are some —

§ 845. Further comments of the court which sustain us throughout in the position sought to be taken.—"If the locator makes his location crosswise instead of lengthwise of the lode, then the end lines of the location become side lines, and he can only take so much of the lode lengthwise as lies within the surface lines of his location. But if the lode runs like the contact vein does through the Ural surface ground, there is no substantial reason that would justify a court in declaring that the locator would not be entitled to any extra-lateral rights. No such construction has ever been given to the statute."[3]

[1] Cons. Wyoming M. Co. v. Champion M. Co., *infra*.

[2] Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418.

[3] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540. See also Del Monte M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212; affirmed, Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55; Flagstaff M. Co. v. Tarbet, 98 U. S. 463.

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§ 846. No force in suggestion to postpone marking.— There is but little, if any, force in the suggestion often made that the locator should postpone the marking of his boundaries until sufficient explorations are made to ascertain the true course and direction of the vein.[1] The case just considered furnishes a fair example of the difficulties so often encountered by the miner in his efforts to determine the direction of the vein he has discovered. The Wyoming vein had been discovered forty years and worked more or less during that time, and yet, with all the working, it was impossible for the witnesses to testify with any degree of certainty the true course and direction of the vein. He (the locator) is required to exercise his best judgment from the developments he has been able to make, and he is, of course, confined to his surface location, whether his judgment was right or wrong. Said the court: "The statute should be so construed as to give to the locator what he actually locates, no more and no less. It should be liberally construed in his favor, so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the government in opening up the mineral lands for exploration and development. When a prospector discovers a vein of ore of sufficient value to justify the expenditure of time, labor and money to open it up and develop the same, he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extra-lateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location."[2] The court is now clearly within

[1] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; King v. Amy & Silversmith M. Co., 152 U. S. 222.

[2] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540; s. c., 62 Fed. Rep. 945. See also Walrath v. Champion M. Co., 63 Fed. Rep. 552; s. c. on appeal, affirmed, 171 U. S. 293.

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the lines of the law and is enunciating the exact principles we have contended for throughout. Proceeding beyond the case in hand the court makes this —

§ 847. New but progressive announcement of the law.— While, as we have elsewhere said, there are some cases, and doubtless will be others, as we shall see further on in this work,[1] where this principle should be applied, as, for example, where a vein begins and ends wholly within a claim without crossing either line, or where it crosses the same line twice,[2] where this principle ought to be applied, it does not seem to us that it was a proper remark for the case in hand. However, it is good law as a general abstract proposition, and we therefore quote it: "One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extra-lateral rights are preserved and maintained as defined in the statute."[3]

§ 848. Further comments to matters in last section — Dangerously near the old law.— The principle contended for in the last preceding section by Judge Hawley, if held within due bounds, would doubtless be of value in some such

[1] *Post*, this chapter, §§ 858–59.

[2] Catron v. Old, 28 Colo. 433, 48 Pac. Rep. 687; Montana M. Co. Ltd. v. St. Louis M. & M. Co. of Montana, 104 Fed. Rep. 664.

[3] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

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cases as those we suggested as a preface to the quotation made. But the danger would always be that of practically ignoring the boundaries as marked on the ground, thereby relegating the lode itself to substantially the same condition as fixed by the law of 1866. This would open the door to hair splitting, in some cases, in the effort to ascertain by proof which lines were to be considered as end lines and which should be considered as side lines. We think classification the only safe plan, and that wherever the vein crosses a line and does not return to that line, with very rare and scattering exceptions, it should be treated as an end line.

In the Champion case, from which we have quoted so copiously in the preceding sections, Judge Hawley further expresses the doubt whether it were not better to return to the Spanish and Roman law, under and by which all lines were drawn vertically, and vertical boundaries prevailed. We are free to say that much litigation has resulted from our present system, but is it therefore to be condemned? To our minds the innate justice of the apex doctrine, in the abstract, in giving to the discoverer the entire vein to its utmost depths within his boundary lines, is enough in itself to offset many objections that might otherwise be seriously made to the law on account of the litigation it entails. Moreover, a return to the old system is not the true remedy, because this one is fruitful of litigation, unless it can be said that courts must interpret afresh, and on each occasion that the question is presented, the meaning of congress as declared in the mining statute, without reference to any system such as we have attempted to point out. But we think the courts, if they will systematize the decisions and the law as we have attempted to outline and define them in this work, may thus safely turn from the maze of difficulty, otherwise presented, to clear and beaten paths.

§ 849. **Irregularly-shaped locations consolidated in one patent.**— Locations consolidated in a patent, commonly called group patents, sometimes present questions similar to

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those discussed in the preceding sections where the vein crosses the end line and the side line, and it would seem that they are controlled by the same principle.[1] And that whether it be a peculiarly-shaped location, or more than one location consolidated, the rule must be that where a vein crosses one line substantially across the dip, and another not parallel with it, the extra-lateral rights should be confined within a parallel made at the point of departure with the line so crossing the strike and conforming to the dip.[2] The principle upon which this rule is applied is the governing one that all courts agree should control in this class of cases; that is, the miner is to have as much of the vein throughout its entire depth as he owns of the apex. As was said by the supreme court of Montana: "If the miner has the apex in his location he is to have the vein, and he is to have as much length of the vein on the strike, no matter how deep he may go on the dip, as he has length of apex within his surface lines."[3]

§ 850. Same question — The Carson City case.— The only case presenting this precise question is a case arising in the northern district of California, where it was tried by Judge James H. Beatty, district judge of Idaho.[4] This was a case where several locations had been patented as one claim. The apex of the vein crossed the end line of one location, according to the contention of the defendant, but as to this there was some dispute, and some question whether it did not extend from the cross-fissure some seven hundred feet east of the westerly end line, westerly some fifteen hun-

[1] Carson City G. & S. M. Co. v. North Star M. Co. (C. C. A.), 83 Fed. Rep. 658, affirming same case, 73 Fed. Rep. 597.

[2] See same case.

[3] Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 273, 276. See also Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 8, 11 Pac. Rep. 515; Clark v. Fitzgerald, 171 U. S. 92; Del Monte M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.

[4] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

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dred feet, and terminate before reaching the easterly boundary of the claim. The case was illustrated in both courts by the following diagram:

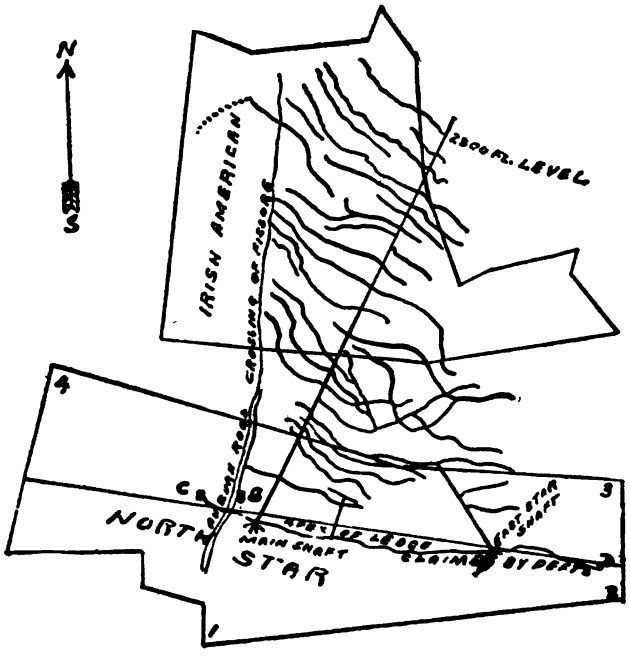

Fig. 24.

At all events, in any view of the case, it became an immaterial question whether it began and ended wholly within the group or crossed the easterly end line and ended at the fissure. The plaintiff owned the Irish-American, into and beneath the surface of which the vein had penetrated on its dip to the northward, and the bone of contention was the ownership of the ore which the defendant took from beneath the surface lines of the Irish-American. It was claimed on the trial that the extra-lateral rights were confined to the lines as made in the original location of the surface, and that in a case where a vein might cross another location, those lines forming its side lines would be drawn upon it

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vertically, or, following the Amy & Silversmith case, where it crossed a side line, such line would be drawn against it vertically. The court held that there is no limit to the number of claims which may be patented in one application; that defendant owning several claims comprising the North Star might have procured separate patents, and in so doing might have so established his lines as to make them parallel, just as is done now in application for patent, and if several claims jointly included the entire apex of all the veins, they could have been so surveyed as to make all the end lines parallel, and thus give it what it substantially claims in the North Star patent. That defendant had only done by one act, at less expense, what it might have done by several acts and at greater expense. The North Star is of greater superficial area than in law is ever authorized for a single ledge location, but it has been held by the supreme court that while the law prescribes a limitation to a single location, there is no limit to the number of locations one person may hold by purchase, or that may be included in a single patent.[1]

"It is therefore concluded," said the court, "that the defendant may follow its ledge on its descent under the Irish-American claim, and to any depth, between a perpendicular plane drawn through the east end line of the claim and another similar parallel plane crossing such claim at the point fixed as the western terminus of the ledge, being designated by "C," . . . and judgment for defendant is ordered accordingly."[2]

In upholding this judgment the circuit court of appeals of the ninth circuit uses these words: "We are of opinion that the defendant was not required to show the separate lines of any of the original locations embraced within the surface boundaries of its patented claim. It was enough for it to show that a lode running in an easterly and westerly direction, and having its apex within the surface boundaries of the patented ground of the North Star, extended, in its

[1] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

[2] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

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downward dip, into the workings of the Irish-American ground owned by the plaintiff in error, and that all its acts complained of by the plaintiff were in extracting ore from such lode 'extended downward vertically,' within its side-line planes, beneath the patented lines of the Irish-American ground. It is true that the burden was upon the defendant to show by a preponderance of the evidence that the ore which it extracted from beneath the patented surface ground of the plaintiff belonged to the lode or vein the apex of which was within the surface lines of its own patented ground.[1] But this burden is met and overcome by the undisputed facts, found by the court, that the defendant was the owner of and in possession of the entire apex of the lode within the boundaries of the North Star patented mine, and its continuity and identity in its dip downward vertically beneath the Irish-American ground. It was unnecessary to go further, by proving the lines of one or more or all of the locations as originally made."[2]

§ 851. Original location lines immaterial — Doctrine of Doe v. Sanger.— It will thus be seen that the lines of the original locations are not of such controlling importance as that they may not be changed. Indeed, we have already seen that amendments and addenda to locations may be made at any time before patent.[3] The obvious reason of this is that lines may be finally adjusted by the addition of more ground, by purchase or location, the changing of locations themselves, or any other fair and legitimate means whereby the miner is enabled to completely and properly cover the strike of his vein.

Imaginary lines are unimportant. The vital question, after all, is, does the miner own the apex and strike of the

[1] Citing Duggan v. Davey, 4 Dak. 110, 122, 26 N. W. Rep. 887, 891; Leadville M. Co. v. Fitzgerald, 4 M. R. 380, 15 Fed. Cas., p. 98, No. 8,158; Stevens v. Murphy, id.; Doe v. Waterloo M. Co., 54 Fed. Rep. 935, 937; Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 551.

[2] Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. Rep. 658, 663.

[3] *Ante*, Part VII, ch. V.

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vein, and is the ore in question under the neighbor's ground, the ore having its apex in the miner's claim between vertical planes of parallel exterior boundaries, extended in their own direction?

The tendency of judicial thought, as we shall see hereafter,[1] and as the subject of mining law is becoming better understood, is to enlarge rather than to diminish the extra-lateral right, and in no case to deny it, where it is capable of ascertainment. Resort to the common-law rule should never be invoked, except in cases of doubt as to the true position of the apex.[2]

An illustration of this principle is found in a case decided by the supreme court of California.[3] It will be better understood by the following diagram:

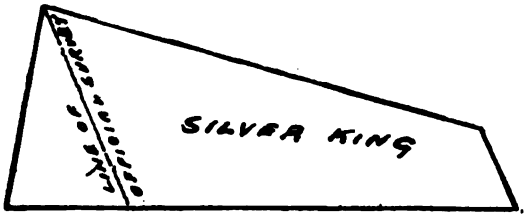

Fig. 25.

The strike of the vein was easterly and westerly through the Silver King claim, the plaintiff owning a claim to the south, called the "Oriental," and the dispute was as to the ownership of ore bodies dipping from the apex in the Silver King southerly into and under the surface ground of the Oriental. In this case the location was made with the southwesterly side line much longer than the northeasterly side line, the claim running substantially northwest and southeast; but when surveyed for patent, the southwesterly side line was shortened so as to create a parallelism of end lines. It was contended that, the location originally not being in the form of

[1] *Post*, this Part and chapter, arts. C. and D.

[2] Bunker Hill & S. M. Co. v. Empire State Idaho M. Co., 106 Fed. Rep. 471-74.

[3] Doe v. Sanger, 88 Cal. 203, 23 Pac. Rep. 365.

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a parallelogram, the doctrine of the Horseshoe case must apply and all lines be cut down vertically; that a figure such as this gave the locators no extra-lateral rights. The court, speaking through Mr. Justice McFarland, said: "But we do not think such a construction of section 2320 is admissible in any view, or for any purpose. It would include absolute mathematical parallelism; for, if the divergence of a few feet in a distance of six hundred feet would not vitiate a location, why should any reasonable divergence, which does not materially change the figure of the location from that of a parallelogram? The intention of the statute was to make valuable property rights of lode miners to depend upon something more substantial and important than the mere trick of a perfectly correct measurement of surface ground or mathematically accurate survey. A substantial compliance with section 2320 is all that is required. . . . If, however, a location is made in substantial compliance with the intent of the statute,— that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent,— such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel as much as they did in the case of the Silver King. . . . The statutes of congress upon the subject, except so far as they provided for patents, were little more than mere formal legislative declarations of what had before rested in the unwritten consent. They follow mainly the customs which miners exercising the license had established among themselves, and which fixed the character and incidents of mining property. And one of the inherent and most valuable qualities of property in a lode mine, as fixed by these customs, was the right to mine the lode to indefinite depths, although it might so far depart from a perpendicular in its downward course as to extend outside the vertical side lines of the surface location."[1]

[1] Doe v. Sanger, 23 Pac. Rep. 367.

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§ 852. Claims patented separately and consolidated, grouped and operated as one mine after patent.—The question as to whether the lines circumscribing the individual claims as patented may be practically obliterated, for the purpose of asserting extra-lateral rights, has never been directly decided in any of the cases reaching the courts of last resort. It is settled law that the miner owns as much of the vein to its uttermost depths, between the extended vertical planes of his surface lines, as he owns of the apex.[1] Why then is it important whether he owns it in one claim or in a dozen? Is it not sufficient that he owns it and that his neighbor does not? That is, providing of course that he has one line correctly laid upon the surface across the dip, between which and another line drawn parallel with it on his own ground, and extending thence into the dip of the vein, his rights can be ascertained and defined.

In the unreported case of Crown Point Mining Co. v. Ontario Silver Mining Co.,[2] where, upon plaintiff's theory of the case (see Fig. 26, page 754), the vein departed from the side line of the Ontario and both sides of the Banner and Henrietta, parallel claims, and further to the southwest was supposed to cross the end lines of another claim, near the compromise line between the Ontario and Daly. Under the pleadings the ownership of all these claims, and others, was set up and the claim made that they were operated as one mine. Justification for extracting ore from beneath the surface ground of the Munadore, the property of plaintiff, a claim lying to the north of the westerly end line of the Ontario and extending about half westerly and half easterly from said point, was claimed by virtue of the own-

[1] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 91; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848; Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; Republican M. Co. v. Tyler M. Co., 79 Fed. Rep. 733; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 273: affirmed, Clark v. Fitzgerald, 171 U. S. 91.

[2] Crown Point M. Co. v. Ontario S. M. Co., Circuit Ct. Dist. of Utah, 1900, unreported.

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ership of such apex, which in one paragraph of the answer was claimed to extend across the westerly end line of the Ontario, and in another paragraph thereof was claimed to extend through the Ontario, Banner and Henrietta, the property of the Ontario company.

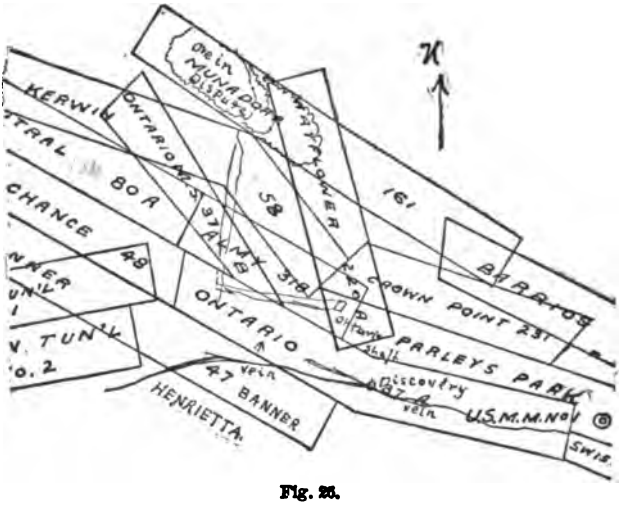

Fig. 26.

Judge Hallett refused to submit the question arising upon the latter contention to the jury, as requested by the defendant, but submitted only the question presented by the justification claimed in virtue of the vein passing over the westerly end line of the Ontario claim, and the jury by their verdict necessarily found that the vein did not cross the west end line of the Ontario.

In the article on mines and mining written for the Encyclopædia of Law, we refrained from criticising the decision of Judge Hallett in his submission of this case to the jury, for the reason that we were of counsel in that case, and for the further reason that it was then pending on appeal in the circuit court of appeals. It has since been settled, and while one reason remains for refraining from criticism the other does not.

With becoming deference to the learned judge who tried

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the case, we desire simply to say that it is difficult to observe any sound distinction between a case such as the North Star case, where claims were consolidated prior to patent, and patented by a description covering exterior boundaries, which every lawyer knows must have been composed of many locations, and the case under consideration, where patented claims are so grouped, held and operated after patent, unless it can be said that in purchasing from the government internal lines may be obliterated, while in purchasing from the individual locators, or making separate locations, they may not.

It seems to us that the principle involved was correctly elucidated by Judge Beatty in the North Star case, and that it applies as well to claims consolidated and grouped after patent as to those grouped by a patent, for the reason, in addition to what we have already said, that the same controlling purpose applies in both cases. Judge Beatty said: "Moreover, the defendant, owning the several claims which now compose the North Star, might have procured separate patents for each claim, and in doing so might have so changed the end lines as to make them parallel, just as is always done now in application for patent; and, if the several claims jointly included the entire apex, all the claims could have been so surveyed as to make all the end lines parallel to each other, and thus give it what it now substantially claims by its North Star patent. The defendant has only done by one act, at less expense, what it lawfully might have done by several acts at greater expense. The North Star patent is of greater superficial area than any law has ever authorized for a single ledge location; but it has been held by the supreme court that, while the law prescribes the limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be included in a single patent, and, as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims.

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Such was the holding as to agricultural lands,[1] . . . and as to placer claims [in another case].[2] There appears no reason why the same rule should not apply to quartz claims."[3]

Of course it will be urged that in purchasing an individual location adjoining that of the purchaser, no greater rights could be acquired than that possessed by the individual claim. And, in the abstract, this would be true. But it must be borne in mind that rights are only relative after all, and while an individual title standing alone might not be perfect, yet, by adding another outstanding title to it, it might be made good.[4] And so with the mining claim — one may not accurately cover the apex properly, so as to give extra-lateral rights in a given direction, while two adjoining claims would completely cover the question. It is believed that the law is sufficiently elastic in principle to permit a strengthening of an apex title in this way. This principle can be illustrated by the diagram on page 757.

Suppose that A. owns the claim marked "A," and B. and C., respectively, own the others. All are patented separately before the real strike of the vein is known, and surface disputes settled either by proper exclusions or by deeding back certain of the conflicting area. The ore in dispute, let us say, is at "D," the dip being in that direction. A., in mining, ascertains this fact, and after the claims are patented buys the claims "B" and "C." Neither claim alone is sufficient upon which to maintain the right to remove the ore, but all together are. The ore does not belong to D. By apex right he has no ore. Why may not A. justify his entry and removal of ore by virtue of having purchased all the claims, his rights being confined finally within parallel planes properly extended instead of the planes as located. That is to say, the line 1–2 produced and the dotted line 3–4.

[1] Polk's Lessee v. Wendell, 9 Cranch, 87.

[2] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

[3] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597, 600.

[4] Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. Rep. 98.

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In the case under consideration the Ontario company held undisputed ownership to a group of claims which, beyond dispute or question, contained the apex of the vein for nearly a mile on its strike. The vein was a true fissure,

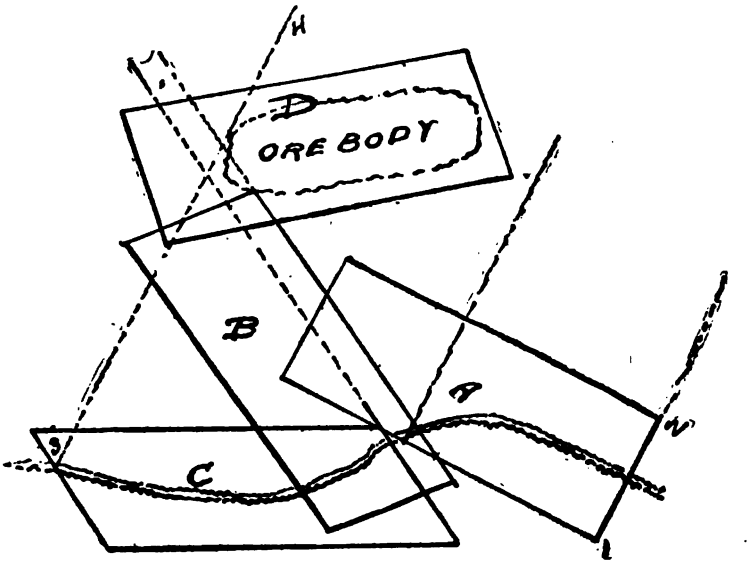

Fig. 27.

and never lost its identity or continuity as it proceeded into the earth. The apex, as owned by the Ontario, extended six hundred feet to the east of the most easterly end line of the Munadore, and to the west it continued for over two thousand feet beyond the most westerly line of the Munadore. Yet the learned judge, who made famous the words "if there be magic in the word 'line' it will be better not to use it,"[1] permitted himself to be misled by the supposed presence of imaginary lines, and thus to allow an adjacent claim owner to take, upon common-law principles, the dip of the vein within the side lines of the Munadore, the apex of which belonged to the Ontario.

[1] Del Monte M. & M. Co. v. New York & L. C. M. Co., 66 Fed. Rep. 212-215.

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The further we pursue this subject the more clearly it appears that to deny extra-lateral rights, under such circumstances, would be a denial of justice. This may always go as a characterless child of the imagination without legitimate adoption or sponsorship by a court, but it seems to us the courts must sooner or later come to this view of the law.

§ 853. The doctrine of this article summarized.—We have attempted to outline in the preceding sections of this article what seems to be the pervading and controlling principles of the law, from which we are justified in extracting the following general conclusions:

(a) Congress was evidently concerned, in enacting the apex doctrine, with an equal and equitable system or means of disposing of the vein on its downward course, and to this end was enacted the principle of parallelism of end lines. It being the purpose, meaning and intent thereby that the miner should have the same length of the strike of his vein, to its uttermost depths, between the vertical planes of his surface boundaries produced in their own direction through the dip, as he owns of the apex. Or, as said by Judge Hawley: "One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location."[1]

(b) Whether the claim be a single location or a group, the extra-lateral right should be measured by any line crossed by the vein on its strike which most nearly conforms to the dip of the vein, and another line drawn parallel therewith at the point where the apex of the vein departs from the claim.

[1] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 549.

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Article C.

Crossing Same Line Twice, or Crossing No Line.

§ 858. Preliminary — Growth of the thought denying extra-lateral rights.
859. Apex crossing the same side line of the claim twice — The Fulton claim and the Drum Lummon compared.
860. Vein beginning and ending wholly within the claim — Crossing no line at all.

§ 858. Preliminary — Growth of the thought denying extra-lateral rights.— Ever since the Horseshoe case was decided, courts and lawyers have taxed their ingenuity and their imagination, in nearly all cases involving the apex question, to find a case where there was a shadow of justification to deny extra-lateral rights altogether, as if they understood it to be the meaning of congress to escape, under all possible circumstances, the granting of extra-lateral rights wherever possible; or, as said by Dickens, when speaking of the Circumlocution office, "to strive how not to do it."

We have attempted to outline in this branch of our work the controlling and general principles of the law upon this question, and we think we are justified in concluding therefrom that the general policy of the law, as now understood and enunciated by the courts, is to grant extra-lateral rights in every case where there exists any certain line from which to measure the right. The common-law rule should only apply in cases where there is doubt as to what apex an underground body of ore belongs.[1]

§ 859. Apex crossing the same side line of the claim twice — The Fulton claim and the Drum Lummon compared.— We have found but one case where this question was squarely decided, and that arose in Colorado,[2] although there is one other case in Montana where substantially the

[1] Bunker Hill & S. M. Co. v. Empire State Idaho M. Co., 106 Fed. Rep. 471, 474.

[2] Catron v. Old, 23 Colo. 433, 48 Pac. Rep. 687.

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same question was involved, or, rather, the same condition existed. We will take up the Colorado case first, which will be best understood by reference to the following diagram taken from the report of the case:

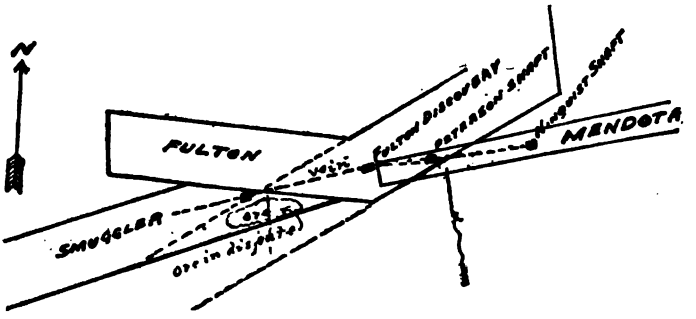

Fig. 28.

Defendants are the owners of the Fulton and Mendota mining claims. All the claims are patented, and the dotted line on the map shows the apex of the vein through the claims. This vein, which has been explored extensively in workings in both the Mendota and Fulton claims, dips to the south beneath the surface of the Smuggler claim. In following the vein upon its dip, the defendants passed beyond the side line of the Fulton claim, and are working beneath the surface boundaries of the Smuggler claim at a point marked "A" upon the map. The question presented is as to whether the vein at "A" belongs to the owners of the Fulton by virtue of the ownership of the apex, or to the owners of the Smuggler in virtue of their common-law right. In the trial court verdict and judgment passed for the defendant, the owner of the Fulton and Mendota claims. The case was reversed in the appellate court by an opinion by Mr. Chief Justice Hayt, in which all the quotations from other cases were accurately made, and perhaps that is all that ought to be said about the opinion, the effect of which was to deny extra-lateral rights entirely. About the conclusion itself, however, there is much to be said. The injustice of denying extra-lateral rights, where they can be

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accorded, would be a result not intended by the law-making power, and which ought to be avoided.

It may be admitted with reference to this case that there is no rule by which the owner of the Fulton can get just what the locator thereof intended to secure at the time of making the location, namely, fifteen hundred feet of the strike of the vein, with the right to pursue the same indefinitely on its downward course between the produced end lines of the claim. It does not follow, however, that he should be denied extra-lateral rights altogether. He may have been unfortunate in not laying his lines so as to place an end line across the strike of the vein. But such rights as he has should not therefore be sacrificed on the altar of strict or unreasonable construction. The language of Justice Brewer[1] is particularly applicable here.

"Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein the top or apex of which lies within his surface lines."[2]

In view of this controlling construction of the law, what becomes of any such nonsensical and unjust conclusion as that reached by the Colorado court, by which extra-lateral rights are denied altogether? Manifestly it must be relegated to the scrap-heap of judicial absurdities. If it is attempted to be answered that the court cannot make a location for the miner, the observation may be made that no such thing is necessary.

There are two theories, both clearly within the letter and spirit of the law, by which extra-lateral rights can and should be accorded to the owner of the Fulton. The southerly side line thereof forms an obtuse angle, one portion

[1] Del Monte M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 89, quoted in § 837, *ante*, p. 731, note 1.

[2] Id., p. 88.

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thereof varying from the other approximately about thirty degrees.

Defendant also owned the Mendota, and had the right to elect, where they conflicted, upon which title he would rest his rights. Independent of this, he had the right to place his Fulton lines upon the Mendota for the purpose of fixing his extra-lateral rights.[1] It is settled law, as we have seen, that the statute grants to him as much of the strike of the vein at its uttermost depth as he possesses thereof at the apex,[2] always to be taken, of course, between the same lines. It will be observed that the vein crosses the south-easterly side line of the Fulton at an angle of about twenty-five degrees. Another line drawn parallel with that at the other point of departure would not only accord him what the law gives him, namely, extra-lateral rights, but would have given him the ore in dispute, and changed the result of the suit. Again, lines drawn parallel with the end lines at both points of departure will give him what both the letter and the spirit of the law say he shall have.

In the Montana case, precisely this thing was done.[3] This can be best illustrated by a reproduction of a diagram on page 763, a portion of which we have given elsewhere.

It will be observed that the Drum Lummon vein enters and departs from the St. Louis claim in a manner not essentially different from that of the Fulton vein. Yet this vein, and the right to follow it between new lines parallel with the end lines of the claim, and projected into the dip where the vein departed from the side line, was accorded to the owner of the St. Louis. This is equitable and just, and we believe the only conclusion which finds its full warrant in the law.

There may be cases, as we shall see in a subsequent part of this work, where it will be impossible to accord extra-

[1] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 85.

[2] *Ante*, § 852, note 1, p. 753, and cases.

[3] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664.

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lateral rights with certainty, and that it is necessary to deny them for that reason. But such a case as this is not one of them.

§ 860. Vein beginning and ending wholly within the claim — Crossing no line at all.— Can the case mentioned in the last preceding section be different in principle from

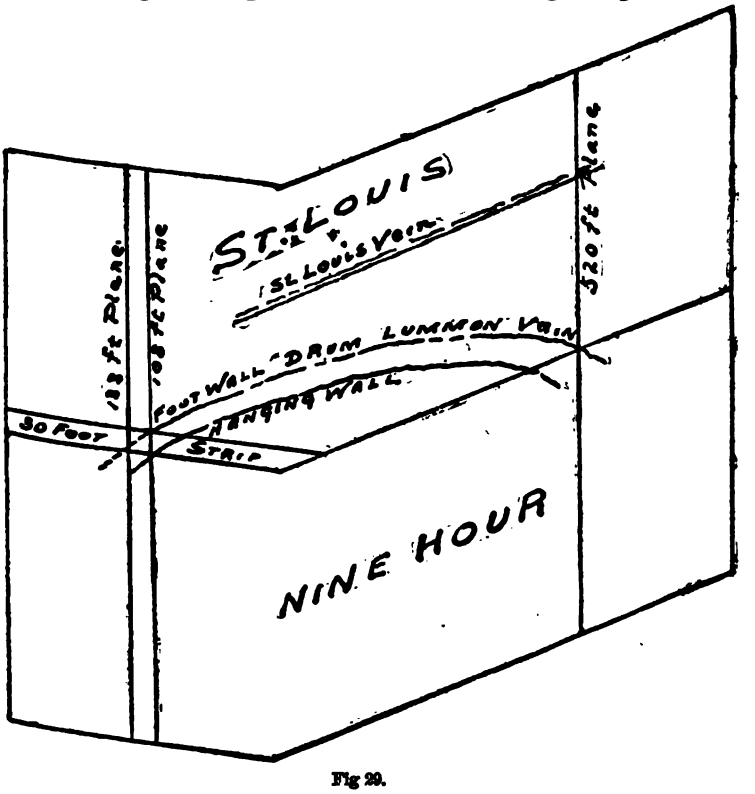

Fig 29.

the case to which we have before adverted, where the apex of the vein might begin and end wholly within the claim? We think not.[1]

There was good evidence besides in the North Star case, to the effect that the apex of the claim did not reach any

[1] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 89. And see *ante*, § 837, note 1, p. 731.

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of its exterior lines. In view of the authorities, and the state of mind of bench and bar to-day, we think we are safe in saying that no lawyer or judge would deny extra-lateral rights in any case where the vein began and ended entirely within a claim. The reason of this principle and of this line of thought is found in the deduction that where a ledge or vein has pursued a known course for some distance within the claim, it affords the presumption that it will continue such course for a sufficient distance to cross a line.[1] If it does not, however, and this fact is known, in accordance with the principle laid down by Judge Hawley in the Wyoming-Champion case, the lines lying across the course of the vein as far as demonstrated should be taken as its end lines and the others as side lines, and extra-lateral rights decreed accordingly.[2]

Article D.

When Extra-lateral Rights Abridged, Cut Off or Denied.

§ 865. When extra-lateral rights are abridged — Previous grant with impenetrable bounding plane.
866. Right to penetrate adjoining ground granted or withheld according to law.
867. Intersecting an older vein on the dip.
868. Lines so laid as to cut off prior vein at particular point of intersection.
869. Effect of consolidating in a group.
870. Other limitations and qualifications — Meeting of converging lines — Controlling importance of priority of location in the ordinary case — Merger of matters of discovery and location in patent.
871. Converging end lines.
872. When extra-lateral rights are wholly denied.
873. For discrepancy of definite wall or casing — The Leadville cases.
874. Extra-lateral rights denied for lack of inclination of dip and because claim not laid upon the strike.

[1] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597, 602.

[2] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 549.

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§ 865. When extra-lateral rights are abridged — Previous grant with impenetrable bounding plane.—Manifestly there are circumstances where the statutory right to follow the dip or downward course may be abridged or cut off; for example, where the vertical bounding plane of a previous grant is encountered, the right to penetrate which is not reserved out of such grant.[1] Such a grant, it is quite apparent, depending upon the angle of approach, would gradually abridge and finally cut off the right to pursue the vein on its downward course. A fair example of such a condition is shown in the case first above cited. H. located a soldier's bounty warrant upon a certain piece of land in California as agricultural land, and made his entry thereon. Some three years later M. located a mining claim adjoining this land. By mesne conveyances, plaintiff acquired the title of H. and defendant that of M. The defendant, in pursuing the vein on its downward course, removed ore from beneath the surface ground of plaintiff. In denying the right of defendant so to do, Judge Sawyer says: "The only question is whether, under the Revised Statutes, a party discovering and acquiring title by patent from the United States to a mineral gold-bearing vein or lode having its apex within the land purchased is entitled to follow the vein or lode down on its dip, across the boundaries of his own lands, into the agricultural lands of an adjoining proprietor, who has the elder title? In my judgment he clearly has not. The equitable title to the agricultural lands held by plaintiff fully vested on the entry and payment by Hammack on June 15, 1874. After that the United States merely

[1] Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 86 Fed. Rep. 668. Pending the appeal in this case the property in question all passed to one corporation, but there were certain stockholders of the Amador-Medean company who claimed to retain the interest they had at the time the decision below was rendered, and in order to preserve their interests without passing upon the merits of the case, there being no longer any real parties in controversy, the supreme court reversed the case. South Spring Hill G. M. Co. v. Amador-Medean G. M. Co., 145 U. S. 300, 36 L. ed. 712.

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held the dry legal title in trust for the purchaser without any pecuniary or beneficial interest in it. From the moment of the entry, payment and issue of the certificate of purchase, these lands cease to be public, and become private property."[1]

This is undoubtedly the law, and nothing more need be added to it. The cases, however, calling for the application of this rule are rare and becoming more so, for the reason, as we have seen, that wherever lands are granted by patent, agricultural, town site, or otherwise than as mineral lands, in a mining locality, the minerals and mining rights are generally, almost without exception, reserved by the law and by the patent from the operation of the grant, and the right to penetrate adjoining land is reserved out of such land.[2]

§ 866. Right to penetrate adjoining ground granted or withheld according to law.— Standing alone, the mere insertion in the patent of the grant of the right to follow the vein on its downward course within the planes of the end lines, produced in their own direction, and assuming even that it be a perfect location, would be absolutely meaningless, unless such adjoining or neighboring land had in turn this right reserved out of it. All of these rights are creatures of the statute, and, in expressing or reserving them in or out of patents, the officers of the land department merely speak by the statute, or, more accurately, the statute speaks through them, and only such rights can be inserted therein, or exceptions reserved therefrom, as are authorized by the law.[3]

[1] Amador-Medean G. M. Co. v. South Spring Hill M. Co., 86 Fed. Rep. 668. See also the cases there cited, Pacific Coast M. & M. Co. v. Spargo, and same against Fick, 8 Sawy. 647, 16 Fed. Rep. 348; People v. Shearer, 30 Cal. 648; Gwynn v. Niswanger, 15 Ohio, 368; Astrom v. Hammond, 3 McLean, 108, 2 Fed. Cas. 71; Carroll v. Perry, 4 McLean, 26; Carroll v. Safford, 3 How. 441; Witherspoon v. Duncan, 4 Wall. 210, 219; Hughes v. United States, id. 332; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, 24 Fed. Cas. 590; Wirth v. Branson, 98 U. S. 118.

[2] See *ante*, Part X, ch. VI, §§ 755-758. See also § 666.

[3] See *ante*, Part X, ch. VI, §§ 755-

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§ 867. Intersecting an older vein on the dip.— The right to pursue the vein on its dip or downward course is likewise cut off when it unites with an older discovered vein. The statute reads: "And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including the space of intersection."[1]

It thus appears that the right is granted by the statute *ex vi termini*. The language of the statute is plain and unambiguous, and the only circumstances that we can call to mind that can involve the slightest doubt as to its meaning are those where the surface boundaries of a claim might be so laid across the strike of the vein as to preclude the owner of the oldest vein from claiming below the point of intersection at a particular place, or where there has been consolidation, and a priority thus obliterated. We will consider these matters in the next succeeding sections, and in the meantime it is sufficient to say that the mandatory force of this statute has been recognized by the courts wherever brought in question.[2]

§ 868. Lines so laid as to cut off prior vein at particular point of intersection.— One of the exceptions to the general rule is, as noted in the last preceding section, where the lines are so laid as to prevent the assertion of prior and superior right of the older vein in consequence of the absence of the right to pursue the vein on its downward course or dip at the particular point; for it must be remembered that the same rule applies in this class of cases as in all

758. See also § 666, and Deffeback v. Hawke, 115 U. S. 402; Cowell v. Lammers, 10 Sawy. 245, 21 Fed. Rep. 200; Butte City Smoke-house Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858: Doe v. Waterloo M. Co., 54 Fed. Rep. 936.

[1] R. S. U. S., § 2336.

[2] Little Josephine M. Co. v. Fullerton, 58 Fed. Rep. 521; Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. Rep. 98; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. Rep. 513; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Roxanna G. M. & T. Co. v. Cone, 100 Fed. Rep. 168.

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others in respect of the right to follow the vein on its downward course, which must be between the planes of lines properly laid upon the surface, or judicially considered as properly laid, for the particular place. An example of this class of cases is shown by the following diagram recently used in a late case:[1]

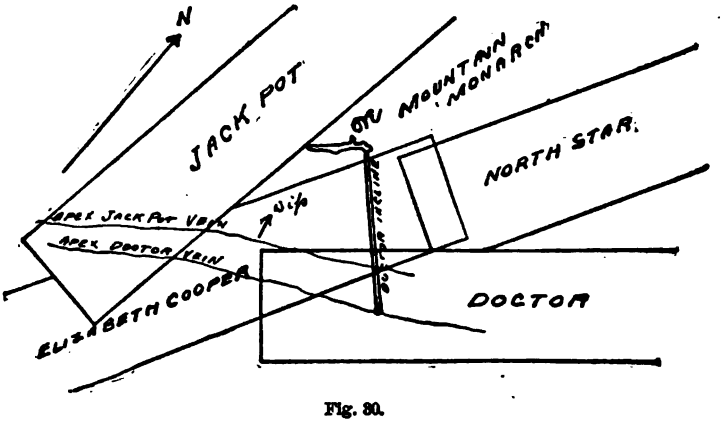

Fig. 80.

This was an application for an injunction by the Mountain Monarch owners against the owners of the Doctor, where it was claimed that the right of the owners of the Doctor vein was lost in consequence of its union with the Elizabeth Cooper vein at a point nearer its apex than the ore bodies in dispute. The application for injunction was denied, and we think correctly, for the reason that the Elizabeth Cooper people were not in court, and, as each of the parties was there standing on his own rights, the Mountain Monarch people, not being possessed of any vein at all apexing in its own ground, could not assert the existence of a third right that would deny or cut off, or in any manner absorb, such independent extra-lateral rights as the Doctor owners possessed.

But there is another feature of the case which had an important bearing upon the matter in hand. We have com-

[1] Roxanna G. M. Co. v. Cone, 100 Fed. Rep. 168.

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pleted the lines of the Elizabeth Cooper location for the purpose of this illustration, and likewise extended the Jack Pot vein in its own direction until it crosses the southerly side line of the Elizabeth Cooper. The result is a manifest denial of the right of the Elizabeth Cooper owners to any ore found beneath the Mountain Monarch claim, for the reason that its extra-lateral rights extend in the direction of the North Star, and not in the direction of the Mountain Monarch. In other words, its side lines become its end lines, are drawn vertically, and the result is a denial of any right to penetrate the Mountain Monarch.

§ 869. Effect of consolidation of a group — Estoppel — Segregation.—Another exception to the general rule is found where several locations are consolidated in one group and worked and operated as one claim under such circumstances as to completely obliterate individual priority. Thus, where A. had consolidated many claims into one group, and conveyed a portion of the consolidated claim to B., they went upon the ground and marked the boundaries of the segregated portion and described it accordingly in the grant. And, while the effect of such a grant was rightly held to convey all the gold and other minerals beneath the surface, with all the mining rights appurtenant thereto, it was also held, and correctly, we think, that the segregation, and the grant in consequence thereof, had the effect to estop A. from any claim of priority; and that, while the general mining customs and rules prevailed in the interpretation of the deed, the effect of the grant was to convey to B. all the gold contained in any vein apexing within the ground conveyed, and that in such case section 2336 of the Revised Statutes has no application.[1] The effect, then, of such a conveyance, in the absence of reservation, is to give to the grantee the ore below the intersection, regardless of priority, and regardless of the statute. The other aspect of the proposition would be equally true: that priority, being once obliterated and

[1] Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. Rep. 98.

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wiped out, could never be re-established by a segregation of the claim, unless the deed of segregation expressly recognized it.

§ 870. Other limitations and qualifications — Meeting of converging lines — Controlling importance of priority of location in the ordinary case — Merger of matters of discovery and location in patent. — Excepting as expressly limited under such circumstances as those indicated in the last preceding section, the doctrine of priority of location, as we have repeatedly pointed out in the preceding sections of this work, is a pervading and all-controlling principle of the mining law. Flowing from this principle is the doctrine by which the right to pursue the vein on its downward course is abridged, substantially in the same manner as when encountering an agricultural claim, when the vein on its downward course encounters the projected end lines of an older claim, containing the same vein and so laid as to intersect one of the end lines of the junior claim produced in its own direction. An example of this principle is to be seen in the Tyler and Last Chance cases, where the vein ran through the Tyler claim and crosswise through the Last Chance, whose end lines became side lines.[1] By a previous judgment of the court the Last Chance claim had been decreed to be the older location.[2] The ore bodies in dispute lay in such a position that the dip of the vein, followed within the surface lines of either location projected in its own direction, would have fully embraced them. Priority of location therefore controlled the right.

The position will be better understood by the diagram on page 771, taken from one of the reports of the case.

The dip was to the southwest. Judge Hawley, in speaking for the court of appeals, thus states the law upon the subject: "Upon the agreed statement of facts, the priority of the Last Chance claim is established. This being true,

[1] Flagstaff M. Co. v. Tarbet, 98 U. S. 463.

[2] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. See also Bunker Hill & S. M. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471.

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its extra-lateral rights to follow the lode in its downward course, between vertical planes drawn through its side end lines, is well settled, and the extra-lateral rights of the Tyler claim cease when the vertical plane drawn downward

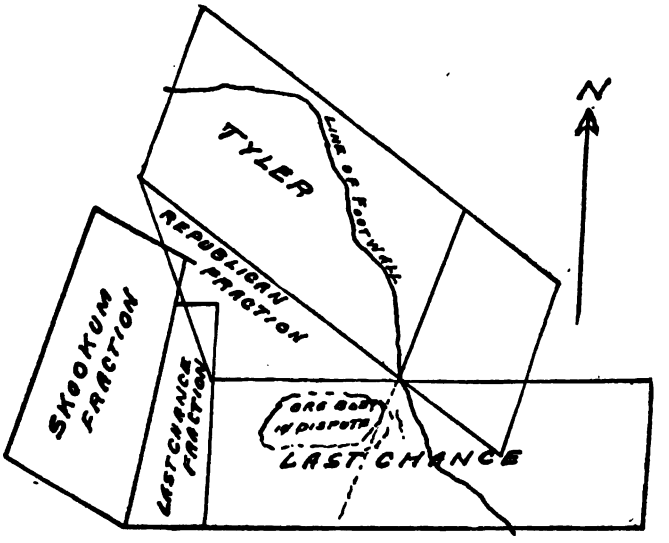

Fig. 31.

through the north side end line of the Last Chance claim is encountered. It follows that the court did not err in rendering judgment in favor of the Last Chance company for its costs, and it is therefore unnecessary to determine what the extra-lateral rights of the Tyler company would have been had the lode, when it crossed the southerly side line of the Tyler claim, extended in an easterly, instead of a southerly direction, as shown in the diagram, or, in other words, 'more along than across the lode.'"[1]

Another case presenting the question of priority of location determining the right to ore bodies, the apex of which is within the legal end lines of both claims, is presented by

[1] Tyler M. Co. v. Sweeney, 79 Fed. Rep. 277; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848; s. c., 54 Fed. Rep. 284, 61 Fed. Rep. 557.

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the Argentine-Terrible case.[1] In the first trial of the case the Adelaide was attempted to be overthrown for want of a discovery, except in the tunnel, and *dictum* was announced authorizing a senior location, with discovery on the dip, to prevail over a junior one with discovery on the surface apex. But that question was not really involved, as both claims were patented, and all these questions were merged in the patent. The questions of locality of ore taken, and priority of location were the only real ones involved, and were finally decisive of the case. In the second trial[2] the question of discovery was still supposed to be at issue, and the correct doctrine announced that a discovery of mineral elsewhere in the claim than where first claimed would be sufficient to save the claim on this point. For the reasons already stated, this point was not involved in the case. The real point involved was the right to certain ore bodies beneath the surface of the Adelaide, the property of the plaintiff Van Zandt, and afterwards the Terrible Mining Company, which had been mined by the Argentine Company, the owner of the Pine, Camp Bird and Charleston, all of which were patented, but the Adelaide was older both in date of location and patent. The point involved may be further illustrated by the diagram on page 773, copied from Mr. Lindley's excellent work.

The apex of the vein is shown by the line xx; the dip was to the south. It will be observed that, like the Tyler-Last Chance case, as to the ore bodies beneath both the Pine and Adelaide, the side lines being end lines, the lines of both claims would cover the same ore body, and that if the vein had not apexed in the Adelaide as well as in the Pine, the latter would own all between its end line side lines produced, and that as to the area covered by both claims, pri-

[1] Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 30 L. ed. 1140. For reports of trials of the same case below, see Van Zandt v. Argentine M. Co., 8 Fed. Rep. 725; Terrible M. Co. v. Argentine M. Co., 89 Fed. Rep. 583.

[2] Terrible M. Co. v. Argentine M. Co., *supra*.

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ority became the governing principle. The application of that principle in that case likewise required an absolute interruption and cutting off of all right to pursue the vein on the dip as to the segment thereof beneath the Adelaide

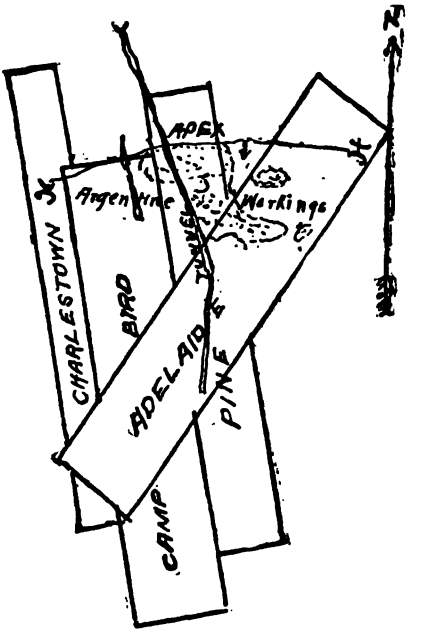

Fig. 32. [After Lindley and Emmons.]

claim. Of course if the pay chute continued in the direction of the side lines of the Pine, which were as to the vein its end lines, the right could be again asserted to the portion lying southerly of the Adelaide claim and within the extended lines of the Pine if the ore chute happened to be accommodating enough to remain within those lines. But most ore chutes, or more properly rakes in the vein, take a course into the dip of the vein obliquely through the dip and strike, and it is very seldom that end lines are so laid as to entirely include one; for it must be remembered that in those cases the apex of the chute is the point where the line of contact or of vein matter comes nearest the surface of the earth, and not always the point where the chute itself reaches the highest point in the stratum, vein or contact.

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§ 871. Converging end lines.—The right is also abridged and finally cut off when the lines crossed by the vein, denominated by the law as end lines, actually converge in such a way that they ultimately meet. An example of this case is shown in the Wyoming-Champion diagram,[1] where

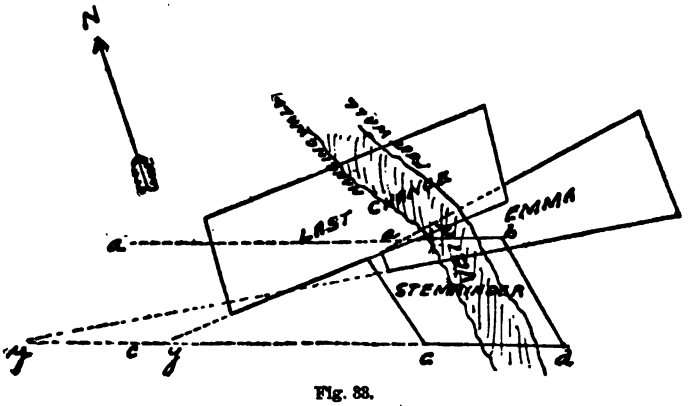

Fig. 33.

it will be observed that the Wyoming patent, considered alone, has end lines laid squarely across the lode at the point of departure, but these end lines, owing to the shape of the claim, rapidly converge and if extended would ultimately meet. The same condition is better shown in the diagram of a late case.[2] In such case, of course, the end lines being drawn vertically, the owner has merely the wedge-shaped piece that his surface lines give him. For the rule that we contend for, and which we believe the sum of judicial opinion warrants us in characterizing as a rule, permits the drawing in of lines; that is to say, where two lines are not parallel crossed, a new line will be made at the point of departure, parallel with the one most nearly agreeing with the dip of the vein, provided the line so made is wholly within the surface lines of the location. But the law, in granting this right, will never extend it beyond the ground claimed. But

[1] 63 Fed. Rep. 543.

[2] Bunker Hill & S. M. Co. v. Empire State Idaho M. & D. Co. (C. C. A.), 109 Fed. Rep. 538, affirming S. C., 108 Fed. Rep. 189. See Fig. 33.

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where the locator himself, by reason of the relation of his claim to other claims, or from choice, has marked his boundaries with converging end lines, or where he has failed to seasonably protect his rights, he must abide the consequences.

In this case, the trial court, while it recognized the impenetrable end line of the Emma, overlooked, inadvertently perhaps, the equally controlling end line made by the south line of the Last Chance, and extended the line of the Emma over that, practically ignoring it; whereas, because of the surface conflict and the patent proceedings, the same rule should have been applied there as where the Emma line was encountered. The court of appeals, however, affirmed the judgment, merely saying, in passing, that the defendant had obtained more than it was entitled to.

§ 872. When extra-lateral rights are wholly denied.— There have been several cases where the courts, in a too zealous adherence to the principles of the common law, have felt constrained, in consequence of the shape of the surface lines, to deny extra-lateral rights altogether.[1] The trend, however, of later judicial opinion can now be hopefully said to be directed toward a more liberal view of the law; so much so that it may now be broadly stated that, where the vein crosses one line of a claim and continues for any considerable distance with its apex wholly within the claim, extra-lateral rights will not be denied to it. There is one case, however, where, owing to the indefinite and peculiar shape of the surface boundaries, the court was justified in denying extra-lateral rights. This case is commonly called the "Horseshoe case,"[2] and will be better understood by

[1] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Montana Co. v. Clark, 42 Fed. Rep. 626; Catron v. Old, 23 Colo. 433, 48 Pac. Rep. 687. See also Doe v. Sanger, 83 Cal. 203; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Gilpin v. Sierra Nevada M. Co., 2 Idaho, 626, 23 Pac. Rep. 547.

[2] Iron Silver Co. v. Elgin M. Co., *supra*.

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reference to the following diagram from a report of the case:

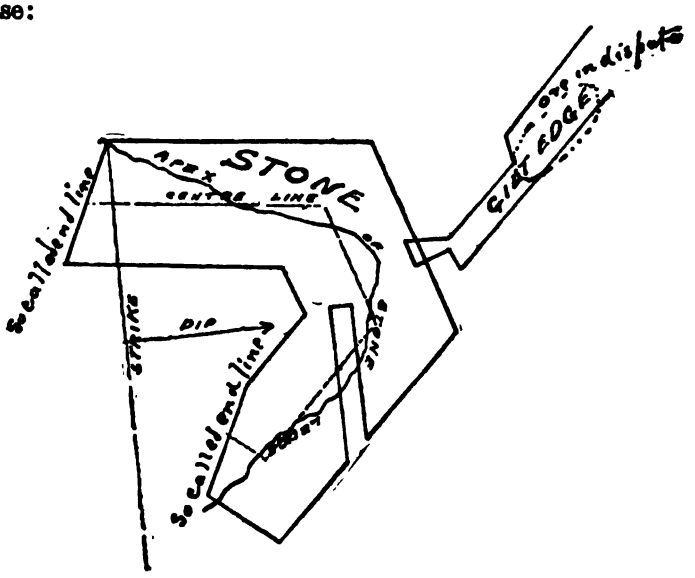

Fig. 34.

The owner of the stone claim had followed the ore down on its dip beneath the Gilt Edge and had extracted ore from beneath the surface of that claim, and, standing upon its common-law rights, the Gilt Edge brought its action therefor.

It will be readily noticed that, owing to the erosion of a gulch in the surface of the country, the surface lines were laid upon two fragments of dip exposure, and were in no sense laid along the strike of the lode. The line marked "dip" on the diagram marked substantially the course of the California Gulch. There was absolutely no other conclusion than the one actually reached. In the Montana case, however,[1] an attempt was made to deny extra-lateral rights to a claim the surface boundaries of which were in the shape of an isosceles triangle. The point

[1] Montana Co. v. Clark, 42 Fed. Rep. 626. Common-law rule not enforced in the last Montana case, State v. District Court Silver Bow Co. (Mont.), 65 Pac. Rep. 1020.

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was really not involved in the case, but was sought to be raised in aid of an injunction to prevent work in the vicinity of the workings of the plaintiff. Perhaps such a question may never be raised again, but if it should be we think it should be decided in accordance with the principle controlling the Del Monte case.

In a recent case in Colorado, which we have already noticed,[1] the court denied extra-lateral rights to a vein crossing both side lines of a claim and dipping under the end lines, citing as authority therefor the Flagstaff case, the Horseshoe case and the Amy case. It is sufficient to say that in neither case did the court decide any such thing; but simply, that where the lode crossed both side lines, such lines became end lines, which implies the right to pursue the lode indefinitely in its downward course within the extended planes of such lines. Indeed, that is the physical fact with reference to the Flagstaff, and it is believed so recognized by bench and bar everywhere, with the exception of this case. The learned chief justice also cites Doe v. Sanger as deciding the same question the same way. But there the court expressly reversed the case, because the trial court followed that rule, and decided that the lines as finally adjusted by the survey controlled the question; and as they were parallel, the enjoyment of extra-lateral rights was thus secured; and that the rule of mathematical parallelism was not necessary, the provision of the statute being directory merely.

§ 873. For discrepancy of definite wall or casing— The Leadville cases.— We refer, more as a matter of history than of law, to a fact well known, that in some of the Leadville cases, extra-lateral rights were denied by the juries, because of a popular belief that in many parts of that district the hanging walls had become eroded away so as to leave the ore bodies only partially covered with drift or alluvion,— the washed stuff from the mountain sides. Because of

[1] Catron v. Old, 23 Colo. 433, 48 Pac. Rep. 687.

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this belief, prevalent among the miners, that such ore bodies did not constitute veins as generally understood, it became unwritten law that extra-lateral rights ought to be denied in all those cases. As an evidence of this fact we invite attention to an apex case arising in Leadville and tried in the circuit court for Colorado, in which Judge Hallett charged the jury, *inter alia*, as follows: "The principal question for your consideration is whether or not the plaintiff has the top or apex of the lode in its location; . . . and first, we may say by way of definition, that the top or apex is the end or edge or terminal point of the lode nearest the surface of the earth. To establish this proposition the plaintiff has given much evidence tending to prove that the ore body terminates at or near the first level north, or the water level spoken of by the witnesses. . . . In that view, if you find that it is sustained by the evidence, the plaintiffs have the top and apex of the lode in their location, and I do not discover any other point which should give you difficulty in arriving at a verdict for the plaintiffs."[1] The jury found a verdict for the defendant.

§ 874. Extra-lateral rights denied for lack of inclination of dip and because claim not laid upon the strike.— One court at least, of undoubted ability, has felt constrained to deny extra-lateral rights on account of the lack of inclination of the vein from a surface exposure, characterized in one view of the case as the apex, and in the other view of the case as a dip exposure. The case itself was ably tried by Judge Moody, and the supreme court in affirming the judgment did so largely, indeed mainly, from the opinion of the trial court. We are indebted to Mr. Lindley for a diagram (on page 779) showing the surface conflicts, as well as a cut showing the northern exposure of Custer Mountain.[2]

It must be remembered that this was an action to quiet title to certain ore bodies; that the Silver Terra did not own

[1] Iron Silver M. Co. v. Murphy, 3 Fed. Rep. 368.

[2] Lindl. Mines, pp. 395, 397.

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any part of the apex or dip exposure, but stood squarely upon its common-law rights. While the language of Judge Church, quoting from Judge Moody, would seem scarcely to warrant the statement that extra-lateral rights were de-

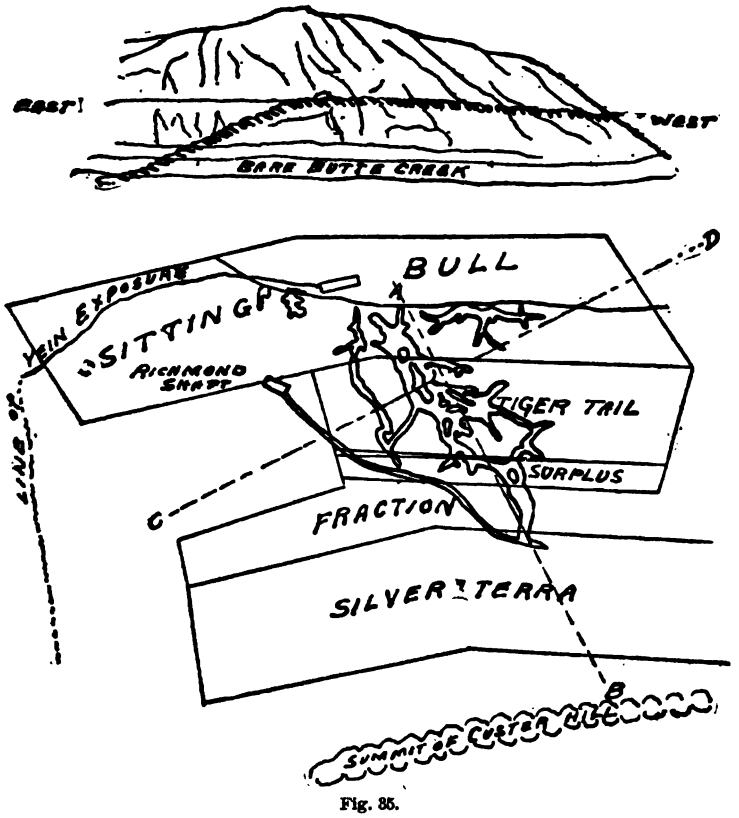

Fig. 35.

nied here because of lack of inclination of the dip, yet, when the entire opinion, masterly in research though it be, is carefully considered and analyzed, it is respectfully submitted that it has very narrow if any other ground to rest upon. The facts showed, as illustrated by maps, that Custer Mountain had a western and northern slope exposure, the one nearly at right angles with the other; the northwest corner, so to speak, being slightly tilted, there was a vein

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exposure along both sides of the mountain; there was a slight inclination of the vein from this point, and a general inclination thereof towards the east, averaging eight degrees from the horizon; the Sitting Bull lode was located along this north exposure of the vein, and it was sharply contested as to whether this or the western exposure was the true strike; the Silver Terra was located up the hill south of the Sitting Bull and parallel therewith, but its end lines did not reach far enough west to cover any part of the western exposure. By shafts sunk down into the mountain, the owners of the Silver Terra removed ore from the vein thus exposed, on two sides of the mountain; the action was brought to quiet title to this vein, and to enjoin further working upon it. The trial court refused the injunction, and the supreme court affirmed this decision, speaking through Mr. Justice Church; the material part of the decision applying here being as follows: "Bearing in mind the descriptions heretofore given of the two lines of outcrop on Custer hill, if we might suppose that the outcrop along the northerly face were nearly vertical, I do not see how it could be seriously contended that such outcrop, under the circumstances, constituted the top or apex of this stratum of quartzite. Such a conclusion would only be reached, it seems to me, by shutting one's eyes to every feature of the case, except the one fact that there was an edge at or near the surface, which was therefore the top or apex of the vein. This I cannot do without such a violation of the ordinary use of words, and, with all the respect and deference which I feel for the opinions of the learned counsel for the defense, I must say without such a transgression of the dictates of a sound common sense view of the situation, as in my judgment the statute does not contemplate. Nor can I see that there would be any difference whatever in the principle were this outcrop to be found at an angle of 45 deg. or, as it is, at an angle of about 8 deg. from the horizontal. I am compelled, therefore, to hold that this outcrop found in the Sitting Bull location is not the top or apex of this

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vein, lode or ledge, and that such top or apex is not within that location. I must regard that outcrop as merely an exposure of the edge of the vein on the line of its dip. . . . After what has been said, it would seem unnecessary to consider whether this vein so far departs from a perpendicular in its course downward as to extend outside the vertically extended side lines of defendant's location, and through the intervening ground to the ground in controversy,— such could not be the case consistently with the facts already ascertained. It may be conceded as, indeed, a mathematical conclusion from the facts, that by extending drifts from the Sitting Bull location through its vertically extended south side line, in any direction upon the vein east of south, a downward inclination would be found, and that such is the fact with regard to the main working tunnel, which extends to the ground in controversy; but, clearly, this is not what the statute contemplated, and, if I am right in my other conclusions, probably this proposition would not be contested."[1] It will thus be seen that it was sharply contested as to whether the west or north exposure was the apex. And against the actual physical location, as such of the outcrop on the north side, with no location on the west line of exposure, the court permitted itself to be led, as matter of fact, by the subtleties of expert opinion, and that against the physical condition of the country, the porphyry dyke on the northwest which was the producing cause of the vein. The strike of the dyke was not given.

[1] Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887.

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CHAPTER III.

RIGHT TO VEINS, SPURS AND OFFSHOOTS OTHER THAN THE ONE LOCATED.

ARTICLE A.

The Laws of 1866 and 1872 Compared — The Statutory Grant of 1872.

§ 880. Preliminary — The law of 1866.
881. The law of 1872 changed this.
882. The relation of this section to section 2336.

§ 880. Preliminary — The law of 1866.— It is acknowledged by courts everywhere that under the law of 1866 the lode was the principal thing located and patented, and the surface ground was a mere incident. And an illustration of the truthfulness of this, and that it was so understood by miners and lawyers alike, is evidenced by the many peculiarly shaped patents that were procured in pursuance of that law.

§ 881. The law of 1872 changed this.— The uncertainty, both in respect to what was acquired by the patent in the way of surface ground, and appurtenant rights upon the lode, furnished at least one of the reasons for the amendment or change of the law in 1872. This statute reads: "The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all the surface included within the limits of their locations, and all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."[1] It will thus be observed that the statute is clear, plain and unambiguous, and gives to the locator all lodes or veins, not only the one located,

[1] R. S. U. S., § 2322; 17 Stat. at L., p. 91.

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but all others having their top or apex within the vertical planes of the surface lines of the claim located,[1] and expressly prohibits the invasion of the surface.[2] If this statute is at all times borne in mind and all its provisions construed together, much of the difficulty which has arisen in one state will be avoided.

§ 882. The relation of this section to section 2336.— In a further part of this chapter it is our purpose to examine extensively the rights acquired to cross veins, and the meaning of section 2336. In the last preceding chapter we took occasion to note and outline, to some extent, the effect upon extra-lateral rights of veins encountering an older vein on their dip. Those cases had reference to such an occurrence proceeding from different apexes in different claims. In a future part of this work we shall attempt to reconcile the many conflicting decisions as to the true meaning of section 2336, and its relationship to the section under consideration; and in doing so it will be necessary to read both sections *in pari materia*, for the reason that they refer to the same subject-matter, and we are therefore not at liberty to ignore this well-known rule of statutory construction.

Article B.

Surface Lines as Controlling Other Veins, and Rights Thereto Extra-laterally.

§ 885. Extra-lateral rights to spurs and offshoots.
886. Judge Hawley's view.
887. An early and somewhat different view by Judge Thayer.
888. The cases harmonized — The true rule.
889. Relation to original date of location.

[1] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522, 531; Freeland v. Hoffman, 13 M. R. 269; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 208; Crown Point M. Co. v. Buck, 97 Fed. Rep. 463; Tombstone M. Co. v. Way Up M. Co., 1 Ariz. 426, 25 Pac. Rep. 794; Argonaut Cons. M. Co. v. Turner, 23 Colo. 400, 48 Pac. Rep. 685; Armstrong v. Lower, 6 Colo. 393, 581; Pardee v. Murray, 4 Mont. 284, 2 Pac. Rep. 16; Jones v. Prospect Mt. Tunnel Co., 21 Nev. 339, 31 Pac. Rep. 642.

[2] North Noonday M. Co. v. Orient

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§ 885. **Extra-lateral rights to spurs and offshoots.**— The question of extra-lateral rights, as applied to spurs and offshoots, is not well settled; some authorities holding that it is dependent upon and coterminous with the lines which control the vein located,[1] while other authorities hold that as to spurs and offshoots, each line crossed by any such vein is, as to it, an end line drawn vertically at the point of departure and extended in its own direction.[2] Applied to different conditions, and referring to different veins, both are right, but it is well settled that there can be but two end lines to a mining claim, and such end lines are such for all purposes.[3] This, then, may be safely said to be the general rule, to which, like all others, there are special distinctions and exceptions.

§ 886. **Judge Hawley's view.**— In a case cited in the last preceding section, Judge Hawley discusses this question at considerable length. In that case there were two nearly parallel veins in a claim located under the law of 1866, and hence of irregular shape;[4] these veins united, as found by the court, below the surface, partly on the dip and partly on the strike; the end lines of the different locations did not agree with each other, considered as an independent location, nor did they agree in any location with the lines of another location. He says: "The views already expressed are conclusive upon the point that complainant, by virtue of

M. Co., *supra;* Phenix M. Co. v. Lawrence, 55 Cal. 143; Erhardt v. Boaro, 113 U. S. 527; Gleeson v. Martin White M. Co., 13 Nev. 442. See also Crossman v. Pendery, 8 Fed. Rep. 693.

[1] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Cosmopolitan M. Co. v. Foote, 101 Fed. Rep. 578; St. Louis M. & M. Co. v. Montana M. & M. Co., 104 Fed. Rep. 664; Walrath v. Champion M. Co., 63 Fed. Rep. 552.

[2] Colorado Central M. Co. v. Turck, 50 Fed. Rep. 888; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478. See also Tombstone M. Co. v. Way Up M. Co., 1 Ariz. 426, 25 Pac. Rep. 794.

[3] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664, 667, citing (*q. v.*) Iron Silver M. Co. v. Elgin M. & S. Co., *supra;* Walrath v. Champion M. Co., 171 U. S. 293; s. c., 72 Fed. Rep. 978; *ante*, § 842.

[4] See *ante*, §§ 845, 848.

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its ownership of the slate vein in the Wyoming, is entitled to an injunction to prevent respondent from working northerly of a line drawn downward vertically with the southerly end line of the Wyoming claim. If no other portion of the ground was in controversy the decision of the case might be safely rested here without any discussion of the many other questions presented at the trial, because the laws of the United States provide that, 'where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.'[1] This provision is held not to be in conflict with the provisions of section 2322.[2] Complainant would, therefore, take the ground to the full extent stated — that is, between the end line bounding-planes of the Wyoming claim extended in their downward course — independent of any rights it may have by virtue of its patent to the Ural lode and surface location."[3]

§ 887. An early and somewhat different view by Judge Thayer.— In a case in Colorado, similar to the Wyoming case to the extent that the vein united both on the strike and dip, thus forming practically spurs in their onward course, and the extra-lateral rights to one of the spurs being under discussion, as it affected the right of pursuit beyond the side line of the Colorado Central, where it crossed, Judge Thayer said: "If the vein on which the Colorado Central location rested became divided as it entered the disputed territory, and the outcrop of one fork crossed into the Atlantic territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and in that event we are of the opinion that the defendant lost that fork of the vein which had passed

[1] R. S. U. S., § 2336.

[2] Wilhelm v. Sylvester, 101 Cal. 358, 35 Pac. Rep. 997; Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418.

[3] Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. See also Cosmopolitan M. Co. v. Foote, 101 Fed. Rep. 518; St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664.

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outside of its side lines. In other words, so far as that fork is concerned, the south end line of the defendant's Colorado Central claim must be regarded as a line drawn through the point where the outcrop passed through its south side line."[1]

§ 888. **The cases harmonized — The true rule.**— In the interest of harmony, then, the true rule would seem to be that as to all veins paralleling or nearly paralleling the one located, and which lie, as to their apex, in the direction of the dip of such vein, that is to say, lying in the hanging wall, paralleling the main vein or uniting on the dip therewith, the lines which control the extra-lateral rights of the main vein must also control the rights as to all other veins.[2] But where there is a lateral division of the main vein, in the direction of the foot-wall, or where there is a parallel vein in the direction of the foot-wall, dipping, let us say, in the opposite direction, the reasons which control the operation of other conditions would seem to cease, and as to any such, any line crossed by it must be either drawn vertically against it or conforming more nearly to the general doctrine in such cases, a line be projected there parallel with any other proper line crossed by it,[3] or parallel with the end lines of the located vein, which would seem be the better rule and one which will more nearly conform to the rule making these lines the end lines for all purposes.

§ 889. **Relation to original date of location.**— Manifestly all other veins, spurs and offshoots relate to the date of the location of the principal vein, and as to any conflict upon the dip they must be considered as located on that day.[4]

[1] Colorado Central M. Co. v. Turck, 50 Fed. Rep. 888, 896. See also Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196.

[2] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664. See s. c., 102 Fed. Rep. 430; Walrath v. Champion M. Co., 171 U. S. 293, 307.

[3] Colorado Central M. Co. v. Turck, 50 Fed. Rep. 888, 896. See also Del Monte M. Co. v. New York & L. C. M. Co., 171 U. S. 55.

[4] R. S. U. S., § 2322.

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Article C.

Placing Lines Upon Patented Ground, or Upon Ground Previously Claimed.

§ 895. Preliminary — The position of the department on this question.
896. Rule inapplicable to locations made prior to May 10, 1872.
897. Correctness of department rules challenged and changed by the courts.
898. As to making locations rigidly — Discovery on claimed ground — Must be good when made — Lines differ from discovery.

§ 895. Preliminary — The position of the department on this question.— While the department has, of necessity, always permitted the survey of a claim to cross upon and overlap an adjoining unpatented claim, even though surveyed for a patent, where the party announced an intention to claim and contest for the conflicting ground, and has also, for the same reason, permitted surveys to cross other claims whether patented or not, it has always made the objection in instructions to surveyors general, and to registers and receivers, against the encroachment by survey upon land previously surveyed whether patented or not. An example of this is found in the following excerpt from the latest code of regulations issued by the department: "The rights granted to locators under section twenty-three hundred and twenty-two, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be 'situated on the public domain.' In applications for lode claims where the survey conflicts with the survey or location lines of a prior valid lode claim, and the ground within the conflicting surveys is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes

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within it. The end line of his survey should not, therefore, be established beyond such intersection."[1]

§ 896. Rule inapplicable to locations made prior to May 10, 1872.— We have already seen that under the law of 1866 the lode was the principal thing located, the surface ground being a mere incident.[2] If there should be any locations unpatented, which were made prior to May 10, 1872, of course the rule announced in the last preceding section never had, and has not now any application. Happily, there are very few, if any, of such locations remaining unpatented. The effect of approaching a patent of that kind with the location made prior to May 10, 1872, and an attempt to patent it under the laws existing to-day, has never to our knowledge been determined. It would depend very much upon the shape of the patented claim as to whether any such thing would be possible.

As an abstract proposition, a patent is a muniment of title upon which the holder has the right to rely for security and peace, and notwithstanding the lode was the principal thing patented, and the surface a mere incident, the holder of a location, we take it, made under the old law, while he would have the right to cross any such patent and to place his lines or stakes upon it, as the law stands now, he would not have the right to acquire, by any such means, any interests conflicting with the patent. Where, however, if any such case remains possible, two unpatented claims made under the old law approach each other at such an angle as to conflict, the rule previously announced by the department, and still in force except as abrogated by the decisions of the courts, would have no application, and each would have the right to follow his vein on the strike, even to the point of conflicting and uniting or crossing the other location and vein.

[1] Land Office Circular, June 24, 1899, p. 7, 28 L. D. 595.

[2] *Ante*, § 880; Atkins v. Hendree, 1 Idaho, 107, New Series, p. 95, 2 M. R. 328: Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253, 9 M. R. 607.

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§ 897. Correctness of department rules challenged and changed by the courts.— The correctness of the position of the department, while it would seem to be sound in itself at first blush, was inconsistent in this respect: If the claimant had what he supposed was a cross-vein, and his end lines extended clear across the previously surveyed ground, he was permitted to survey across and place his line and stake upon it, for the obvious reason that the vein was supposed to cross on the strike. Why should he be denied this right, then, for any other satisfactory reason, for instance, that of correctly adjusting his surface lines with reference to extra-lateral rights, and to include other valuable surface ground, possibly containing veins, and which would be otherwise lost to him? It is no answer to say that he can take nothing from the patented claim, and therefore add nothing to his own.[1] He makes a real line by this means in the place of an imaginary one in some other way, and acquires by direct means the vacant surface ground where he was permitted to do it by indirection under the old rule. This point came squarely for decision before the supreme court of the United States in a case where the relative position of three claims is shown by the diagram on page 790.

The case was certified from the circuit court of appeals, having been originally tried in the circuit court for the district of Colorado, where this particular question does not seem to have been in dispute.[2] The question certified for consideration was as follows: "May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extra-lateral rights not in conflict with any rights of the senior location?"[3]

[1] Bunker Hill & S. M. & C. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471.

[2] Del Monte M. Co. v. New York & L. C. M. Co., 66 Fed. Rep. 212.

[3] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 59, 70.

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The court, after reviewing all the cases, or at least the leading apex cases, pursued what we conceive to be a correct line of reasoning, somewhat as follows: The surface ground is a secondary matter, and generally not taken with

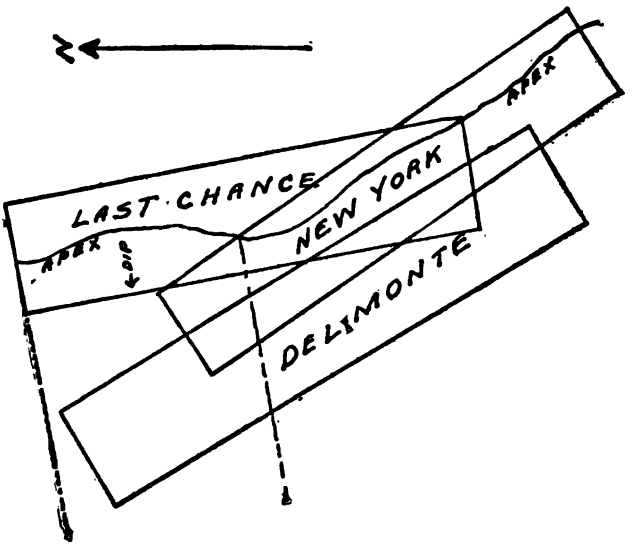

Fig. 36.

the view of getting any benefits from it, the real thing sought being the mineral beneath the surface. The law requires parallel end lines, so the locator may secure as much of the vein on the dip as he owns of the apex. Placing lines upon another location will not injure such location, and will permit the locator doing so to actually mark out what he claims. He takes nothing additional on the strike of his vein, but, in the place of drawing that line not made by him vertically against him, he is permitted to establish a new line parallel with the other one crossed by his vein, the same as in an ordinary end line and side line case; and in answering the question in the affirmative, the court concludes with these words: "In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior locator are laid. No matter where they may be they do not disturb in the slightest

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his surface or underground rights."[1] Any objection upon the ground that the rights of the patentee to peace and security are thus invaded falls flat, for the law, although but recently ascertained has always been so, and it must be conclusively presumed that the patent is granted subject to all the rights, whether expressed or not, which the law allows to the neighboring owner.

§ 898. As to making locations rigidly — Discovery on claimed ground — Must be good when made — Lines differ from discovery.—We have repeatedly said, and such is the law, that a location, to be valid, must be good when made, but this rule applies most essentially to the discovery shaft or work itself, which cannot be laid upon ground previously patented or claimed. The rule, however, has no application to the laying of the boundary lines, or fixing the surface or extra-lateral rights of the vein or lode so discovered and located. Such lines may be placed, as noticed in the preceding section, upon, across or over the surface ground of a previously located or patented claim.[2] *A fortiori*, an amendment to a location may be extended and spread over ground laterally in the same way. That is to say, supposing A. owns three two-hundred-foot claims side by side, all are kept alive, having been located under district rules, restricting their width to two hundred feet. The rule or law is changed permitting him to locate six hundred feet wide instead of two hundred feet wide. Since it is well settled, as we saw in preceding chapters,[3] that amendments may be made so long as they do not conflict with intervening rights, why may he not amend his center location by including the claim on either side, and thus obliterating in fact internal lines,

[1] Del Monte M. & M. Co. v. Last Chance M. & M. Co., *supra*, pp. 75, 84. See also Bunker Hill & S. M. & C. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471; Doe v. Tyley, 73 Cal. 21, 14 Pac. Rep. 375; West Granite M. Co. v. Granite Mt. M. Co., 7 Mont. 356, 17 Pac. Rep. 547; Hidee G. M. Co., 30 L. D. 420. In Alice Lode, 30 L. D. 481, the right to extend lines over a town site is recognized.

[2] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 84; *ante*, § 897.

[3] *Ante*, Part VII, ch. V; Part VIII, ch. IV.

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and the resulting confusion of a vein possibly wider than a single location, or sometimes in one and sometimes in the other location? We see no cogent reason against this, and every consideration of policy in the direction of accurately covering the lode with one claim, as well as properly adjusting his surface lines, is in its favor.

ARTICLE D.

Cross-veins and Cross-courses Intersecting or Crossing on Dip or Strike, and the Space of Intersection.

§ 905. Preliminary — Scope of inquiry.
906. The statutes reviewed and considered.
907. Section 2336 enlarged upon — Means crossing on the dip.
908. Cross-veins and cross-courses — Definition — Surface protected.
909. Same subject — True rule in such case — Surface lines controlling located vein control all others.
910. The space of intersection — The old Colorado rule.
911. The doctrine overturned in later cases and the true rule laid down.
912. The true meaning — Actual intersection of veins — Ownership of ore.

§ 905. Preliminary — Scope of inquiry. — It is the purpose of our inquiry here to define the relationship of section 2336 to 2322 of the Revised Statutes of the United States, and to define the rights of the various proprietors of veins which cross each other upon the dip or strike. When this work was commenced the position of the Colorado court was so irreconcilable with that of other courts upon the subject, and, as we viewed it, with the law itself, that it merited and received an extended criticism. Happily, however, by a reversal of its own position,[1] affirmed by the supreme court of the United States,[2] that court has reached, by correct principles of statutory construction, what we esteem a true solution of the situation.

[1] Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 50 L. R. A. 209, 59 Pac. Rep. 607.

[2] Calhoun G. M. Co. v. Ajax M. Co., 182 U. S. 499, 45 L. ed. 1200.

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§ 906. The statutes reviewed and considered.— Not to repeat at length the provisions of the statute, it is sufficient for the purpose of this inquiry that section 2322[1] gives to the locator all veins of every description the top or apex of which are within his wedge of earth, that is to say, within the vertical boundaries of his claim. We have adverted to this in a slight degree in a previous chapter,[2] and only repeat here in order to show the relationship of the two sections. The statute, *ex vi termini*, gives to the locator "all veins." More comprehensive words could not be used. It includes not only spurs and offshoots and other and independent parallel veins, but it likewise includes cross-veins. Therefore, every part of a cross-vein, the apex of which is found within the bounding planes of an older location, even though its exterior parts be appropriated by another, if such older location was legally made and has been kept alive, becomes the property of the owners of such older location. So far so good. If this is borne in mind, and the other section[3] read in connection with it, the mists and clouds of unreason that befogged the Colorado court for years, are easily rolled away. The other section takes nothing from this, but simply recognizes the fact that veins may cross each other upon the dip and strike, or upon the dip alone, and seeks to provide for and define the rights of the respective parties in the event of such a contingency.

§ 907. Section 2336 enlarged upon — Means crossing on the dip.— It must be borne in mind in the outstart that the first section gives to the locator all veins of every kind. It would seem that this language requires no construction, and unless, as was claimed by a Colorado court, as we shall see hereafter, it is repealed by the subsequent section on account of its position in the statute book, it must be the law. We must, therefore, turn to the subsequent section and see what

[1] R. S. U. S., § 2322.

[2] See *ante*, §§ 885, 889. See also §§ 803, 805, 443, 444.

[3] R. S. U. S., § 2336.

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its language is, and in doing so we find that it treats of veins crossing each other without defining what is meant by crossing — whether upon the strike or the dip; but there is a significant provision in connection with this. This section is composed of two sentences and the word "intersection" is used in both, and, of course, must have been used in the same sense and for the same purpose. Added to this is the fact that in the subsequent sentence the words "below the point of union," used also in connection with intersection, occur. We are not doing violence to the statute, then, by concluding, if such a thing were possible, that congress meant veins crossing on their dip and not on their strike. We will elaborate this farther on.

§ 908. Cross-veins and cross-courses — Definition — Surface protected.— By the customs and usages prevailing in England, veins crossing each other on the strike were generally called cross-courses. The cross-veins in the great Wheal Annie lode in Cornwall present the largest class of veins crossing upon the strike of which we have any information. It is fairly well demonstrated that they occurred and were mineralized at different periods of the geological formation of that country. The circumstance of their crossing on the strike instead of upon the dip is, of course, by reason of the application of the dynamic force which produced them with reference to the point of least resistance.

The strongest argument in favor of the theory, which prevailed in Colorado for a long time, that congress, in enacting section 2336, had in mind cross-courses, is the fact that the cross-courses of Cornwall were sometimes called cross veins. But this is a superficial examination — a striking at the leaves and sticking in the bark, and not getting at the very root and trunk of the question. We have already demonstrated, and the statute is plain upon the subject, that congress rigidly provided against trespassing upon the surface possession of another.[1] It is therefore quite appar-

[1] R. S. U. S., § 2322, last sentence.

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ent, since the section under consideration speaks of veins uniting on their downward course, as to who shall own the ore below the point of intersection, and in the same section providing for veins crossing each other as to the ownership of ore and right of way through the space of intersection, that the framers of the act had in mind the same species and character of intersection and crossing in both cases.[1]

Such a view as this gives force to every part of the statute — any other denies this result. Moreover, when the entire statute is considered together the conclusion is irresistible that in no case did congress intend to authorize the pursuit of a vein on the strike beyond the bounding planes of a location, and that when a senior location crossed the junior one, that part of the junior location is cut out and obliterated, and both side lines of the senior location are end lines, as to it and any vein contained within it, coming in contact with those lines on the strike, and are drawn vertically against it,[2] or at least a new line is made there parallel with the end lines of the claim crossed by the vein.

§ 909. Same subject — True rule in such case — Surface lines control — Line controlling located vein controls all others.— The true rule in respect to cross-veins, if congress was dealing with veins crossing on the strike, must be that the junior is stopped at the point of intersection with the side line of the senior location. As to that particular vein or part of a vein, that line becomes an end line as to both locations and constitutes a vertical plane. This is the Montana doctrine.[3] Any other rule would work

[1] Wilhelm v. Sylvester, 101 Cal. 358, 35 Pac. Rep. 997; Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Calhoun M. Co. v. Ajax G. M. Co., 27 Colo. 1, 59 Pac. Rep. 607.

[2] Colorado Central M. Co. v. Turck, 50 Fed. Rep. 888, 896; Tombstone M. Co. v. Way Up M. Co., 1 Ariz. 426, 25 Pac. Rep. 794; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Walrath v. Champion M. Co., 171 U. S. 293.

[3] Freeland v. Hoffman, Mountain King Lode v. Little Chicago Lode, 13 Morr. M. R. 289; Pardee v. Murray, 4 Mont. 234, 2 Pac. Rep. 16; s. c., on another question, 1 Pac. Rep. 737. Compare Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Tombstone M. Co. v. Way Up M.

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incalculable hardship and loss. What appeared to be a cross-vein might not in fact be such, but might, instead, be the only vein that the discoverer of the older vein had, and turned or bent in the fissure, a not unlikely occurrence, where the strike seemed to be parallel with the side lines, and the surface boundaries were mistakenly marked in consequence thereof. Or, as aptly stated by Mr. Morrison: "In speaking of the distance from the side lines to a supposed crossing of veins, the supposition is of a vein crossing at right angles, which would be the case where the strongest equity could be raised in favor of the owner of the cross-vein. But, in fact, a cross-lode of such character is of rare occurrence; in general, the crossing would be at much less angle, and the less the angle the greater the length of the cross-vein. A case can be supposed of a cross-vein of greater length than the claim from end line to end line, and in such case the cross-vein would claim more than the originally located lode."[1] Such would be the case if the cross-vein, so called, extended across the hypotenuse of the rectangular figure usually forming the location inside the surface bounds.

§ 910. The space of intersection — The old Colorado rule.— Following the ill-considered *dictum* emanating from an early case in the circuit court for the district of Colorado,[2] the state supreme and appellate courts defined the space of intersection to mean the entire intersection of the surface ground of the claim, and thereby gave to the junior locator all the ore found in his vein within the side lines of the senior location and within the space of intersection of the claims.[3] And in a later case the supreme court of that state, while

Co., 1 Ariz. 426, 25 Pac. Rep. 794; Wilhelm v. Sylvester, 101 Cal. 358, 35 Pac. Rep. 997; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 59 Pac. Rep. 607; s. c. affirmed, 182 U.S. 499, 45 L. ed. 1200. See also § 897.

[1] Morr. Min. Rights (8th ed.), 104; Pardee v. Murray, 4 Mont. 234.

[2] Hall v. Equator M. & S. Co., 11 Fed. Cas. 222, No. 5,931.

[3] Branagan v. Dulaney, 8 Colo. 408, 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208, 11 Pac. Rep. 77; s. c., 17 Pac. Rep. 513, 13 Colo. 174; Morganson v. Middlesex M. & M. Co., 11 Colo. 176, 17 Pac. Rep. 513.

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doubting the correctness of the previous decisions, refused to overturn the doctrine announced, following the rule *stare decisis*,[1] and holding that, inasmuch as titles had become settled in Colorado, it would work incalculable hardship to overturn it.

§ 911. The doctrine overturned in later cases and the true rule laid down.—The supreme court of Colorado, however, in a later case takes up the previous decisions and carefully reviews them and determines that the statute generally applies to veins located under the old law, to veins uniting both upon the dip and strike, and its main aim was to provide for the ownership of ore in cases where veins intersected beneath the surface, where no surface conflicts arose or were to be considered, and was to be construed in connection with the other section, preserving intact the surface rights of the senior proprietor. The reasoning of the court itself is sound and conclusive, and we therefore take the liberty of reproducing it:

"Under section 2322 no rights were given the owner of a location crossing a prior one to invade the latter for any purpose in following his vein upon its strike. This was an important matter. Without such right a portion of his claim might be rendered valueless. But, if the expression 'space of intersection' is limited to the intersection of the vein as the space through which he should have a right of way for the convenient working of his mine, it would be of no avail, for he would have no right under which he could reach that easement; and so, again, in order to recognize one which would be of any value to the junior cross-claimant, the space of intersection must also mean the intersection of the claim (citing).[2]

"The learned author of the work just cited, in treating the subject of title to ore included in the space of intersection as between conflicting cross-locations under section 2336,

[1] Coffee v. Emigh, 15 Colo. 184, 25 Pac. Rep. 83.

[2] Morr. Min. Rights (9th ed.), 115.

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gives the following cogent reasons why, in his opinion, as between such location, the owner of the junior has the right of way through the senior, but no right to the ore of the claim which he crosses: 'It was within the power of congress by a subsequent clause to have made the crossing lode an exception, carved out of the general grant of the words of the previous section; but has it attempted to do so? The only grant of section 2336 is the right of way, which of itself implies that it is not a grant of the vein, but of an easement, to which the estate of the prior location is made servient.' 'To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it, under acts of congress, would require in the working of the act expressions as strong as are required to create an exception in a deed. An exception is an equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location.'

"Under the conclusion reached in Arizona, California and Montana in the cases above cited, the ore within the space of overlapping claims would belong to the owner of the senior location. In the Arizona case that conclusion was reached upon the ground that the expression 'space of intersection' meant intersection of the veins; that they might so intersect upon either their strike or dip; but, as to the former, it was limited to locations made prior to the 10th day of May, 1872. The learned judge who wrote the opinion in that case appears to have given it careful consideration, but, in seeking to harmonize the two sections, it seems to us, fell into the error of (a) holding that the space of inter-

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section meant intersection of veins only; (b) imposed a limit upon the provisions of the section when he announced that it only applied to the intersection of veins upon their strike, under locations made prior to May 10, 1872, which is not warranted, either expressly or by implication; and (c) by so doing necessarily deprived a junior location, made under the act of 1872, of the right of way across a senior location if the former crossed the latter.

"In the California case the eminent jurist who wrote the opinion seems to have entertained similar views regarding the application of this section to rights which vested prior to May 10, 1872, but, except as to those rights, inclined to the conclusion that this section only referred to the intersection of veins upon their dip, which would also result in depriving a junior cross-claimant of a most important right.

"We think that Chief Justice Beatty, who concurred in the opinion in that case, more nearly announced the true doctrine when he said: 'I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of section 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike, without bringing it in conflict with the plain terms of section 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent.'

"The opinion in the Montana case is not altogether clear, but seems to limit the space of intersection, as applied to the facts there presented, to the intersection of the conflicting claims, but does not enter into a discussion of the subject; so that, although we agree with the conclusion reached in each of those cases, we cannot accept the limitations imposed upon the provisions of this section, or indorse the rea-

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sons advanced by the learned writers of the opinions in the Arizona and California cases.

"Our conclusion is that the provisions of section 2336 apply to locations made under the act of 1872 as well as before; refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and, in so far as section 2336 regulates or in any manner provides for the rights as between conflicting claims, it applies only to intersections consistent with all the provisions of section 2322."[1]

§ 912. The true meaning — Actual intersection of veins — Ownership of ore.— The conclusion, then, deducible from the foregoing is that the words "space of intersection" as used by the statute, mean just what they imply — that part and portion of the ore bodies themselves which come in actual, inseparable contact with each other — the union of the ore bodies on the dip of the veins.[2] By the statute[3] the older vein takes all the ore in the space of intersection, giving the junior vein the right of way to use such space for the purpose of following the vein on its dip.[4]

[1] Calhoun M. Co. v. Ajax M. Co., 27 Colo. 1, 59 Pac. Rep. 607, 50 L. R. A. 209; affirmed, s. c., 182 U. S. 499, 45 L. ed. 1200.

[2] Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Wilhelm v. Sylvester, 101 Cal. 358, 35 Pac. Rep. 997; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 59 Pac. Rep. 607.

[3] R. S. U. S., § 2336.

[4] See cases, note 2, *ante*. See also Branagan v. Dulaney, 8 Colo. 408, 8 Pac. Rep. 669; Morganson v. Middlesex M. Co., 11 Colo. 176, 17 Pac. Rep. 513.

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PART XII.

OF THE NATURE, QUALITY, AND EXTENT OF DIFFERENT ESTATES IN MINES ACQUIRED BY PURCHASE AND BY OPERATION OF LAW.

CHAPTER I.

OF FEE SIMPLE ESTATES UNSEVERED — INCLUDING A REVIEW.

§ 920. Preliminary and review.
921. Of the nature, quality and extent of estate generally acquired by conveyance — Conveys minerals.
922. Same — Rule under English railway and other acts.
923. In the absence of severance, mines and minerals belong to the owner of the soil.
924. Of similar rights in England.
925. Certain conveyances of minerals — Effect of, as conditional grant.
926. Same — Meaning of minerals in deeds of conveyance.
927. Entire estate — Implied exception.

§ **920. Preliminary and review.**— In this branch of our inquiry we arrive at the point where the different estates in mines, no matter how they have been acquired, whether by purchase, by location, or by any other means known to the law, are here treated and considered the same. In other words, the source of acquisition, with reference to this particular branch, impresses upon the estate no consequential limitation or condition, and is not material. We have hitherto noticed and defined the meaning of the words "mines" and "minerals," and we have traveled over the public domain from the condition of unappropriated public land, and the discovery of mineral thereon and location thereof, to the patent, and have followed the vein on its descent into the earth, attempting at the same time to define the rights, duties and

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obligations of all persons concerned in mining, in respect to each other, at every stage of the proceeding.

§ 921. Of the nature, quality and extent of estate generally acquired by conveyance — Conveys minerals. — A patent or conveyance from the state, a patent from the United States, or a conveyance from an individual or corporation, agreeable to the general rule of real property, carries with it the minerals therein contained, unless they have been expressly reserved by the terms of the grant, or have been previously severed from the estate of the grantor by the grant to him or some one of his predecessors in interest, or by his grant thereof to another person,[1] and in all such cases the language in the deed must be looked to and the intent of the parties ascertained. Likewise the estate of the grantor must be inquired into, to the end that we ascertain what estate he possessed that he could part with by the terms of such a grant, and the surrounding circumstances must be fully considered. And if the grantor owns the entire estate, it will pass to the grantee in the absence of an express reservation, or a manifest intent to otherwise limit the grant.[2]

§ 922. Same — Rule under English railway and other acts.— In England, it seems, a grant to a railway company of the right to dig and maintain a tunnel through certain land does not convey the minerals. Nor does it entitle the

[1] For a discussion of conveyances so far as deemed essential to this work, see *post*, Part XIII, ch. I. See also Curtis v. Daniel, 10 East, 272; Townley v. Gibson, 2 T. R. 701; State ex rel. Tillman v. Coosaw M. Co., 47 Fed. Rep. 225; s. c., Coosaw M. Co. v. State of South Carolina, 144 U. S. 550; United States v. Gear, 44 U. S. 120; United States v. Gratiot, 1 McLean, 454, 26 Fed. Cas. 12; s. c., 14 Peters, 526.

[2] Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350; Silva v. Rankin, 80 Ga. 79, 4 S. E. Rep. 756; Tousley v. Galena M. & S. Co., 24 Kan. 328; Stockwell v. Coullard, 129 Mass. 232; Stanley v. Mineral Union (Nev.), 63 Pac. Rep. 59; Algonquin Coal Co. v. Northern Coal & Iron Co., 162 Pa. St. 114, 29 Atl. Rep. 402; Pearne v. Coal Creek M. & M. Co., 90 Tenn. 619, 18 S. E. Rep. 402. See Rowell v. Bodfish (Me.), 10 Atl. Rep. 448.

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company to support for its tunnel and railway, to the extent of preventing the grantor, acting pursuant to the railway acts, from working mines under and adjacent to the tunnel.[1] But it has been held that the titles to minerals belonging to a rectory pass by virtue of the statute authorizing a corporation to sell land, notwithstanding the older statute expressly reserving minerals in all such sales.[2] So, where a town was laid out in Missouri with streets and alleys, and the minerals in the streets reserved to the person so laying out the town, and where the title to both the mineral and certain town lots became vested in one of the projectors of the town, which town lots he conveyed to a grantee, it was held that, notwithstanding the previous severance and reservation of the minerals, such deed conveyed all the minerals under the lot and to the center of the street.[3]

§ 923. In the absence of severance, mines and minerals belong to the owner of the soil.— It is an elementary rule, so well recognized that a citation of authority would seem unnecessary to establish it, that in general, and in the absence of a severance having been previously made, mines and minerals belong to the owner of the soil, whether in lands of the government, or in those of a private individual.[4] In the United States, as we have already seen in this work,[5] there is no jurisdiction or power in any officer of the gov-

[1] London & Northwestern Ry. Co. v. Ackroyd, 31 L. J. Ch. 588, 8 Jur. (N. S.) 911.

[2] Wilson v. Grey, 3 L. R. Eq. 117, 3 L. J. Ch. 62.

[3] Snoddy v. Bolen, 122 Mo. 479; Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190, 3 S. Rep. 23; Tousley v. Galena M. & S. Co., 24 Kan. 328. Compare Des Moines v. Hall, 24 Iowa, 236; Mathuson & H. Zinc Co. v. La Salle, 117 Ill. 411; Hawesville Trustees v. Hawes, 6 Bush (Ky.), 232; Union Coal Co. v. La Salle, 106 Ill. 119: Diedrich v. Northwestern Union Ry. Co., 42 Wis. 260.

[4] United States v. Castelero, and Castelero v. United States, 2 Black, 1; Fremont v. United States, 17 How. 542; Merced M. Co. v. Boggs, 3 Wall. 304; United States v. Parrot, 1 McAll. 271, 27 Fed. Cas. 416; Ah Hee v. Crippen, 19 Cal. 491; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634, 9 Fed. Cas. 592.

[5] *Ante*, §§ 755, 759.

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ernment, in the absence of statute, to grant any lands belonging to the United States. This power and jurisdiction are conferred by and dependent upon the statute.[1] Whence it follows that the United States may, by statute, dispose of its public lands in any way that congress sees fit. We have already demonstrated that it is the settled policy of the government to dispose of its mineral lands, with appurtenant rights, by sale and patent.[2] Whatever rights, then, are acquired out of, by, or under governmental authority in the United States, are in pursuance of law, and dependent, for their validity, thereon.

§ 924. Of similar rights in England.— In England, and in most of the British possessions in this country, while dispositions must be authorized by statute, the rule is somewhat different in respect of royal mines.[3] But otherwise, and as it respects the right of the owner of the soil, in the absence of some covenant running with the land, or other severance of the mineral, as hereinafter shown,[4] he who possesses a fee simple title to the surface of the soil, owns all beneath as well as all built thereon. Hence it is unnecessary to say that when mines or minerals form a part of the whole unsevered inheritance, an owner in fee simple possesses, in all freehold lands, an unrestricted right to work the mines, and his conveyance grants all the mines and minerals therein.[5]

§ 925. Certain conveyances of minerals — Effect of, as conditional grant.— While the minerals are always regarded, in the absence of express provision to the contrary, as a part of the freehold, with which they will pass by deed,

[1] Butte City Smoke-house Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Deffeback v. Hawke, 115 U. S. 392; Davis v. Weibbold, 139 U. S. 507.

[2] R. S. U. S., §§ 2319, 2326.

[3] Bainb. Mines (3d ed.), pp. 24, 25; Lowe v. Govett, 3 B. & A. 836.

[4] *Post*, "Severance," this Part, ch. IV.

[5] Bainb. Mines, *supra;* Lyddal v. Weston, 2 Atk. 20; Seaman v. Vaudrey, 16 Ves. 393; Wilkinson v. Proud, 11 M. & W. 33; Barnes v. Mauson, 1 M. & S. 77.

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it not infrequently occurs, as we will presently notice,[1] that the two estates are severed and separate disposition made of each; this either by deed of the freehold reserving the minerals, or *vice versa*. Of course where such a conveyance or reservation is absolute and unconditional, in the absence of ambiguity a construction by the court is unnecessary. It is quite frequently the custom, however, for the instrument of conveyance, while absolute in its terms, to contain certain conditions which render the estate conveyed, at best, one upon condition. Such an instrument was under consideration in a comparatively late federal case, the grant there being an absolute conveyance of the minerals, but containing a further condition that the grantee should work the premises for coal, iron and other minerals, with privilege of abandoning at pleasure. The circuit court of appeals for the third circuit, correctly, as we view it, held that an abandonment of work by the grantee terminated his rights to the premises under the contract.[2]

§ 926. Same — Meaning of "minerals" in deeds of conveyance.— In New York, where a deed purported to convey all that portion of the John mine lying south and commencing at the center of the vein, it was held that the deed did not include any of the mineral rights.[3] But, in a later case in the same state, it was held that a reservation of minerals included a vein of limestone.[4] So, in the federal court in Pennsylvania it was held that all minerals contained in the land were included and comprehended by the term "land."[5] In Ohio a different view is taken, where the court held that petroleum and natural gas were not in-

[1] See *post*, §§ 957–965, 997.

[2] Paine v. Griffith, 86 Fed. Rep. 452. See also Stratton v. Lyons, 53 Vt. 641. See *post*, §§ 972, 1165, § 1182.

[3] McIntyre v. Buel, 10 N. Y. Supp. 382.

[4] Brady v. Brady, 65 N. Y. Supp. 621.

[5] Paine v. Griffiths, 86 Fed. Rep. 452. See also Kier v. Peterson, 41 Pa. St. 357; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173; Glasgow v. Chartiers Gas Co., 152 Pa. St. 48, 25 Atl. Rep. 232.

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cluded in a deed conveying all iron ore, fire clay and other valuable minerals.[1]

To our mind the first and last cases in this section are wrong. Unless there are some surrounding circumstances limiting the intention, it is too plain for argument that the term "mineral" is a generic term sufficiently broad and comprehensive to include everything within the mineral kingdom.

§ 927. Entire estate — Implied exception.— It will thus be seen that in the United States the general rule is that conveyances, even in mining regions, convey the entire estate if the grantor is seized thereof, and that will be the presumed intention in the absence of an express reservation or exception.[2] Grants of mineral lands from the United States by way of patent, as we have detailed elsewhere, always carry with them limitations and restrictions amounting, *pro tanto*, to the creation of easements, and to that extent a severance of the estate.[3] But there are implied exceptions in all grants, including the United States patent. Thus, where a thing is granted or reserved, the means of enjoying it, such as ways of necessity and the like, are likewise granted or reserved. Thus, in a well-reasoned case in Pennsylvania, this rule was well laid down, and it was held that, in case of granting away the coal in a certain vein, there was an implied right of way reserved through such vein to lower strata, beds or deposits of gas or oil.[4] The same implied

[1] Detlor v. Holland, 57 Ohio St. 492. See Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235.

[2] Wardell v. Watson, 93 Mo. 108; Snoddy v. Bolen, 122 Mo. 478; Caldwell v. Fulton, 31 Pa. St. 475; Thompson v. Mattern, 115 Pa. St. 501, 9 Atl. Rep. 70; Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. Rep. 597; Cons. Coal Co. v. Schmisseur, 135 Ill. 371; Lillibridge v. Lackawana Coal Co., 143 Pa. St. 298, 22 Atl. Rep. 1035; Benavides v. Hunt, 79 Tex. 383; Kincaid v. McGowan, 88 Ky. 91.

[3] See *ante*, Part X, ch. V; Part XI, ch. I.

[4] Chartiers Coal Co. v. Mellon, *supra*. See also Mansfield C. & C. Co. v. Mansfield, 27 Pittsb. L. J. 70; Robbins v. Guffy, 48 Phila. Leg. Int. 462; Rend v. Venture Oil Co., 48 Fed. Rep. 228.

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grant runs with the right given by the patent from the United States to follow a vein on its downward course. That is, the patentee and his grantee are not confined to the mere casing of the vein, but have the right of way through the foot or hanging wall of the vein, as the case may be, for appropriate shafts, tunnels, inclines, drifts, winzes or raises necessary to a complete enjoyment of the ore vein.

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CHAPTER II.

OF DOWER INTERESTS IN MINES.

§ 931. Scope of treatment.
932. Dower in open mines in England.
933. The rule in this country — Endowable of all open mines.
934. Special cases when dower may be claimed, and special subjects wherein it may not be claimed.
935. When dower tenant impeachable for waste.

§ 931. Scope of treatment.— When this work was begun the supreme court of the United States had not passed upon the question as to whether the inchoate right of dower attached to an unpatented mine upon the public domain. Owing to the many characteristics of an estate of inheritance, and notwithstanding the known practice of verbal transfers and of transfers by mere change of possession, we in common with many other attorneys had inclined to the view that the dower right would so attach. We are convinced, however, of the soundness of the reasoning of both the supreme court of the United States and of the circuit court of appeals, and have elsewhere subscribed to the doctrine that the dower right will not attach to an unpatented mining claim upon the public domain.[1] It is not our purpose, indeed it would be foreign to the object of this work, to enter into a discussion regarding the assignment or admeasurement of dower, or to advert in a particular way as to the sufficiency of instruments in particular cases whereby the same may be parted with or lost. It is our purpose rather, and the extent to which we will deal with the subject, to merely point out the particular mining interests which are the subject of dower in this country, and incidentally we will call to our

[1] See *ante*, § 470.

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assistance the prevailing opinion in England, so far as the same may be ascertained.

§ 932. Dower in open mines in England.— There is some diversity of opinion in England as to what particular estate in the husband is necessary in a mine in order that the wife may become seized of the inchoate right of dower therein.[1] The best considered case, however, that we have been able to find lays down the rule, which seems to be generally recognized, that the wife has an inchoate interest, and hence the widow may be endowed of a third part of all open mines at the time of her husband's decease, and there is no difference in the liability of mines forming a separate inheritance.[2] So it has been held that a widow will also be entitled to dower where there is a license or liberty in fee to work mines. Although this liberty only forms an incorporeal hereditament, yet it savors of the realty sufficiently to become liable to dower.[3]

§ 933. The rule in this country — Endowable of all open mines.— The rule seems to be well settled by all the courts in this country that have had occasion to consider the question, that in all cases where the mines have been opened in the life-time of the husband and the right of dower exists, the widow becomes seized of her dower interest therein.[4] As was said by the supreme court of Tennessee: "We hold, therefore, that dower is assignable to widow in mines, quarries, and the like, and she may enjoy the same either by an allotment, by metes and bounds, or by a share of the rents

[1] See Clift v. Clift, 87 Tenn. 17, 9 S. W. Rep. 198, affirmed on rehearing, s. c., 9 S. W. Rep. 360, and cases.

[2] Stoughton v. Leigh, 1 Taunt. 401; Bainb. Mines (1st Am. from 3d Lond. ed.), p. 147.

[3] Co. Lit. 32*a*, 32*b*; Cro. Jac. 621; Bainb. Mines, *supra*, p. 153.

[4] Clift v. Clift, 87 Tenn. 17, 9 S. W. Rep. 198; affirmed, s. c., 9 S. W. Rep. 360, citing (*q. v.*) Coates v. Cheever, 1 Cow. 460; Billings v. Taylor, 10 Pick. 460; Moore v. Rollins, 45 Me. 493; Finley v. Smith, 6 Munf. (Va.) 134; Crouch v. Puryear, 1 Rand. (Va.) 258; Hendrix v. McBeth, 61 Ind. 473; Lenfers v. Henke, 73 Ill. 405; Rockwell v. Morgan, 13 N. J. Eq. 384; Whittaker v. Lindley, 8 Ky. Law Rep. 690.

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and royalties, where the mines or quarries were opened and operated in the life of the husband, whether the same be operated by the husband paying rent or royalty on the yield. And in determining the mode to be adopted in each particular case regard should be had always to the interest of the widow, and the widow is entitled to an account with the heir for the rents and profits from the death of the husband."[1] This right is not affected by the continuance or discontinuance of the working of certain veins, either by the decedent or those claiming under him.[2] And where a salt well had caved in, it was held that the tenant in dower might bore a new one forty feet from the old without being impeachable for waste,[3] and under similar circumstances might sink a new shaft to the same vein in which the dower was claimed.[4]

§ 934. Special cases when dower may be claimed, and special subjects wherein it may not be claimed.— It must be borne in mind that the word "mine" as used in this connection means the particular substance, vein, stratum or lode known to exist, rather than the opening or cavity by which the same is reached. So, a doubt has been expressed as to whether the widow is endowable of an unopened mine;[5] and it has been expressly held by the supreme court of the United States that the right to mine and work guano or phosphate beds, being a mere conditional interest, the widow is not entitled to dower therein.[6] But a demise of all the merchantable, workable and mineral coal which can be removed from certain lands was held to be a sale of the coal, and the royalties were equivalent to the purchase-money, to which the widow of the lessor is entitled to a

[1] Clift v. Clift, 87 Tenn. 17, 9 S. W. Rep. 198, 201. See Summers v. Darnell, 7 Heisk. 565; Lewis v. James, 8 Humph. 537; London v. London, 1 id. 1.

[2] In re Maffet's Estate (Pa. Orph. Ct.), 8 Kulp, 184.

[3] Finley v. Smith, 6 Munf. (Va.) 34.

[4] Crouch v. Puryear, 1 Rand. (Va.) 258.

[5] Whittaker v. Lindley, 8 Ky. Law Rep. 690, 17 Cent. Dig. 1130.

[6] Duncan v. Nevassa Phosphate Co., 137 U. S. 547.

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third.[1] So, where the husband died seized of a tract of land of about fifty acres, four of which contained a slate quarry partially above ground, one-quarter of an acre of which had been dug over and partially opened, it was held that the widow was entitled to dower in said tract, including the entire quarry.[2] So of a lime quarry owned by the husband.[3]

§ 935. When dower tenant impeachable for waste.— We noticed some special circumstances in a preceding section [4] where the dower tenant was held not impeachable for waste. We apprehend that circumstances such as those would in any case justify holding him not so impeachable. But at the common law, and under the old English rule, a different doctrine applied. There it was held generally that for opening a new mine, and sometimes for digging a new pit on the same mine, which was often considered equivalent to opening a new one, the dower tenant was so impeachable.[5]

[1] In re Maffet's Estate (Pa. Orph. Ct.), 8 Kulp, 184. See also Dicken v. Hamer, 29 L. J. Ch. 778.

[2] Billings v. Taylor, 27 Mass. (10 Pick.) 460, 20 Am. Dec. 538. See also Rockwell v. Morgan, 2 Beas. Ch. (N. J.) 384.

[3] Moore v. Rollins, 45 Me. 493.

[4] *Ante*, § 933.

[5] Bainb. Mines (1 Am. from 3d Lond. ed.), pp. 43, 147; Stoughton v. Leigh, 1 Taunt. 410.

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CHAPTER III.

OF LIFE ESTATES IN MINES, AND THE RIGHTS AND DUTIES OF LIFE TENANTS.

§ 940. Preliminary — Scope of treatment.
941. Estates for life — Generally life tenant may not waste inheritance — Waste by trespasser.
942. The rule as to tenants in tail.
943. Waste of mines defined.
944. Same subject — As to open mines — Life tenant's rights — Anticipation of estate in expectancy.
945. Same — As to unopened mines and strata.
946. Exceptions to the general rule — Permissive waste.
947. Burden of proving waste — Presumption.
948. No distinction in Scotland.
949. Permissive waste — Mining by tenant in tail in new mine.
950. May not destroy estate by permissive waste — When may open abandoned mine — Question of fact.
951. Petroleum — When considered mineral and when as income, and not of corpus.
952. Customs affecting rights of life tenants.

§ **940. Preliminary — Scope of treatment.**— In England, where so many estates are held merely for life, the rights, duties and liabilities of a life tenant have been the subject of much controversy. The general proposition growing out of these controversies, so far as material to the present inquiry, is that, while the life tenant may not waste the inheritance, yet there are certain acts which he may do and certain mining operations which he may carry on in respect of open mines, without being impeachable for waste. It is our purpose to elaborate these circumstances at some length in this chapter.

§ **941. Estates for life — Generally life tenant may not waste inheritance — Waste by trespasser.**— Respecting the rights and duties of a life tenant, they are the same every-

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where; and upon him, as also upon a tenant in tail, after possibility of issue extinct, there are certain duties imposed and certain well-recognized limitations and restrictions upon their operations of the subject of their tenancy. As to the life tenant, it is well settled that he may not, as a general rule, waste the inheritance.[1] It is not waste, however, to work open mines in the ordinary course of good mining; and new pits to a known mine may, in a proper case, be dug.[2] In a case where waste was committed by the assignees of a tenant for life who was bankrupt, it was held that the first tenant in tail was entitled to all the proceeds as the owner of the first estate of inheritance. If the acts had not been wrongful, the assignee would have been entitled for the life of the bankrupt. There was another tenant for life still living, and who had not taken any part in the waste. The same rule prevails in favor of a tenant for life unimpeachable for waste, when the waste has been committed by a deceased tenant for life, who had no right to commit waste. When waste has been committed by a trespasser, or wilfully or maliciously by one having a limited right, the proceeds belong to the owner of the first estate of inheritance, with due regard to the extent to which a tenant for life has been injured.[3] Moreover the question as to whether the life tenant is or is not dispunishable for waste must often, indeed very generally, depend upon the terms of the instrument or will by which the estate for life was settled or created. Standing independent of such limitations he may make reasonable and ordinary use without being answerable for waste.

[1] See *post*, §§ 944, 945; Neel v. Neel, 19 Pa. St. 323; Whitfield v. Bewit, 2 P. Wms. 240; Clavering v. Clavering, id. 388; Viner v. Vaughn, 2 Beav. 466; Astray v. Ballard, 2 Mod. 193.

[2] Bagot v. Bagot, 32 Beav. 509, 15 M. R. 130.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), 40; Lushington v. Boldero, 15 Beav. 1, 21 L. J. (N. S.) C. C. 49; Waldo v. Waldo, 10 id. 312; Bell v. Wilson, 35 L. J. Ch. 341; Bagot v. Bagot, *supra*.

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§ 942. The rule as to tenants in tail.— A tenant in tail has, like a tenant in fee simple, an estate of inheritance in the lands limited to him, but his estate must descend in the particular line marked out for its devolution. Ordinarily it may be said that a tenant in tail, after possibility of issue extinct, is dispunishable for waste; but he may not commit wanton or malicious waste, though he may fell timber, pull down houses and open and work mines,[1] in the ordinary course of good husbandry or good mining, and still remain dispunishable for waste.

§ 943. Waste of mines defined.— It may be stated as a general rule in England and the old rule in some parts of this country, that it is an act of waste to work unopened mines and quarries, or to produce any change in the land that affects its enjoyment in the state in which it was received.[2] As an example, it has been held to be waste where any act is done diminishing the value of the estate, and increasing the burden upon it, or impairing the evidence of title.[3] But it is well settled that a tenant for life may take gravel, clay, stone or mineral for his own use or for the repair of the estate,[4] and this whether the mines are opened or unopened.[5] The later rule, however, in this country is not nearly so rigid as to unopened mines, and much depends upon the circumstances, and a known vein may be opened

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 40, 41; Co. Lit. 27*b*; Abraham v. Budd, 2 Freem. 53; Louis Bowles Case, 11 Rep. 50*a*; Cook v. Winfred, Abr. Eq. 221; Williams v. Williams, 12 East, 209.

[2] Moyle v. Moyle, Owens, 266; Nowell v. Downing, 2 Rol. Abr. 816; Bagot v. Bagot, 32 Beav. 509; Bond v. Lockwood, 33 Ill. 212; Owings v. Emery, 6 Gill, 260; Drown v. Smith, 52 Me. 141; Pynchon v. Stearns, 11 Met. 304; Chase v. Hamilton, 7 N. H. 177; Read v. Read, 1 Green Ch. 247; Shaw v. Wallace, 1 Dutch. 453; Freer v. Stotenbur, 36 Barb. 641; Keeler v. Eastman, 11 Vt. 293.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 40; Doe v. Earl of Burlington, 5 B. & A. 507; Hill v. Taylor, 22 Cal. 191.

[4] Bainb. Mines, *supra*, p. 42; Nowell v. Downing, *supra;* Irwin v. Covode, 24 Pa. St. 162; Westmoreland Co.'s Appeal, 35 Pa. St. 344.

[5] Moyle v. Moyle, *supra;* Neel v. Neel, 19 Pa. St. 523.

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in a new place, constituting a new mine as formerly understood, without being liable for waste.

§ 944. Same subject — As to open mines — Life tenant's rights — Anticipation of estate in expectancy. — Respecting the rights of a life tenant, therefore, in open mines, it is well settled that he may work them even to exhaustion, because this is the usual and ordinary purpose of their ownership; it being considered that it is not waste, but work, to mine.[1] The cases were carefully reviewed, and a fair extract of their meaning thus declared to be the law by the supreme court of West Virginia: "Upon the strength of these cases it is conceded by both parties that mines of oil and of gas in place are land, and, as such, go with the inheritance; and it must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold in his possession, which possession extends from top to bottom, to the sub-surface as much as to the surface — in other words, to the land as a whole, — or the tenant for life has a freehold, as well as tenant in fee;[2] and that the owners of the inheritance have no more right to approach by a tunnel and break and enter his superficial close than they have to break and enter his close on the surface. Their estate of inheritance is vested in right of interest, but not in right of enjoyment. Their estate is expectant on the determination of the life estate. It is the duty of the life tenant to spare and preserve the corpus of the inheritance, and of the owners of the fee in expectancy to wait, for they

[1] Clavering v. Clavering, 2 P. Wms. 388; Elias v. Snowden Slate Quarries, L. R. 4 App. Cas. H. L. 454; Stoughton v. Leigh, 1 Taunt. 410; Astray v. Ballard, 2 Mod. 193; Lord Cowley v. Wellsley, 35 Beav. 635; Millette v. Davy, 31 Beav. 470; Darcey v. Asquith, Hob. 94; Owings v. Emery, 6 Gill (Md.), 260; Franklin Coal Co. v. McMillan, 49 Md. 549; Vervalen v. Older, 8 N. J. Eq. 98; Capner v. Flemington M. Co., 8 N. J. Eq. 467; Williard v. Williard, 56 Pa. St. 119; Kier v. Peterson, 41 id. 361; C. & A. Oil Co. v. U. S. Petroleum Co., 57 id. 88; Rankin's Appeal, 1 Mona. 308, 2 L. R. A., 429; Westmoreland Coal Co.'s Appeal, 85 Pa. St. 344; Wentz' Appeal, 106 id. 301; Finley v. Smith, 6 Munf. (Va.) 124.

[2] Co. Litt. 43*b*; 4 Com. Dig. 62.

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have no present right of use and enjoyment, and cannot exercise any right by anticipation; and their respective duties point out their respective rights. It is further conceded, on the strength of these cases and of the books generally, that if these mines of oil and gas had been open when Kerns, by cutting down his fee, came in as tenant for life of the immediate freehold, then he would have a right to work them during the continuance of his estate, and take the issues and profits thence produced; for these two are derivative parts of one estate; each, in quantity of ownership and order of enjoyment, is measured and determined by time; and though both are vested in right, the life tenant has the hither segment,— the immediate freehold,— and therefore the sole right to hold, use and enjoy. And, if the mine is 'open' when he comes in, then we conclude that the one who had the right to say has, by his actions, which speak louder than words, manifested his intention that it may be worked. Hence the life tenant may lawfully mine, sever and convert the mineral from land into personalty; and this is something in which the owner of the expectant estate of inheritance has no right. He has a vested right in it as land,— nothing more,— and if the severance is unlawful, may sue at law, enjoin in equity, and have an account;[1] but when, by lawful severance, it ceases to be land, his right ceases, and the owner of the immediate freehold takes the issues and profits; for, under the law, he has a right to the full enjoyment and use of the land and all its profits during his estate therein.[2] The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion; and it is settled law that the rents of an open mine are income and go to the life tenant."[3] The same rule would apply as

[1] University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410.

[2] 2 Bl. Comm. 122; Williams v. Pearson, 38 Ala. 299, 309; Crouch v. Puryear, 1 Rand. 258; 1 Minor, Inst. 54*b*; Crabb on R. P. 682; Jackson v. Van Hosen, 1 Shars. & B. L. C. R. P. 191; McSwinney on Mines, 46, 47; Eley's Appeal, 103 Pa. St. 307.

[3] Koen v. Bartlett, 41 W. Va. 559,

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to mines which he was authorized to open; in this respect he is not different in right from a lessee for a term.[1] A mine lawfully leased to be opened is an "open mine" within the reason of the rule as laid down in all the cases.[2]

§ 945. Same — As to unopened mines and strata. — It is equally well settled, on the other hand, both in England and in this country, with very few exceptions, that in the absence of express authority in the title papers themselves it is waste for a life tenant to work unopened mines.[3] An example of this rule is thus given by the supreme court of West Virginia: "A life tenant cannot do anything entailing permanent injury to the estate of the remainderman or reversioner. . . . He . . . cannot open new mines for minerals. . . . It is the duty of the life tenant to protect the land from waste or injury from others, and he must abstain from doing so himself. . . . Therefore, when Jones himself committed waste by boring for oil he was a wrong-doer so far as concerns his life estate. . . . The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open which have become part of the annual profit of the land. . . . When Jones penetrated the soil he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. . . . It may occur that if Jones could not bore, his life estate would be worthless to him. The oil might be drawn

31 L. R. A. 128, 23 S. E. Rep. 664; Rankin's Appeal, 1 Mona. 308, 2 L. R. A. 429, 16 Atl. Rep. 82.

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 52; Co. Litt. 41*b*; Mitchell v. Dors, 6 Beas. 147; Hanson v. Gardner, 7 Ves. 307; Cuddon v. Morley, 7 Hare, 202; Bishop of London v. Webb, 1 P. Wms. 527; Capner v. Flemington M. Co., 3 N. J. Eq. 467.

[2] Koen v. Bartlett, *supra*, 23 S. E. Rep. 666.

[3] Viner v. Vaughn, 2 Beav. 466; Elias v. Griffiths, 8 L. R. Ch. 521, 33 L. T. (N. S.) 871; Darcey v. Asquith, Hob. 234; Owings v. Emery, 6 Gill (Md.), 260; Freer v. Stotenbur, 36 Barb. 641.

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off by wells on an adjoining tract. As life tenant he was entitled to none of it. Such is the quality of the estate."[1]

§ 946. Exceptions to the general rule — Permissive waste.— To the general rule announced in the foregoing sections, holding the life tenant impeachable for waste for working an unopened mine, there are well-recognized exceptions. Thus, it has been held that in a new country a life tenant may even open mines without being guilty of waste.[2] But a life tenant has not the right to lease unopened gas wells on the estate,[3] though he may use coal already mined.[4] And, as we have seen, he may work an old vein through a new pit,[5] and he may likewise make reasonable and necessary use of the estate.[6]

§ 947. Burden of proving waste — Presumption.— The burden of proving waste is on the person claiming it. And, in the absence of proof, the presumption that all men do that which they should do, and act only as authorized, will be indulged to the extent of assuming that the title papers contain ample authority to justify all work done by the life tenant;[7] and this, it would seem, should extend even to new mines opened by the tenant.

§ 948. No distinction in Scotland.— The law of Scotland makes no distinction between opened and unopened mines

[1] Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411; Koen v. Bartlett, 41 W. Va. 559, 23 S. E. Rep. 664; University v. Tucker, 31 W. Va. 622, 8 S. E. Rep. 410; Crouch v. Puryear, 1 Rand. 258; Elwell v. Burnside, 44 Barb. (N. Y.) 447.

[2] Finley v. Smith, 6 Munf. 124; McCay v. Waite, 51 Barb. (N. Y.) 225; Drown v. Smith, 52 Me. 141; Bond v. Lockwood, 33 Ill. 212.

[3] Marshall v. Mellon (C. P.), 26 Pittsb. L. J. (N. S.) 260.

[4] Neel v. Neel, 19 Pa. St. 323; Irwin v. Covode, 24 Pa. St. 162.

[5] Crouch v. Puryear, 1 Rand. 258; Elias v. Snowden Slate Quarries, L. R. App. 454; Gaines v. Green Pond Mt. Iron Co., 33 N. J. Eq. 605; Clavering v. Clavering, 1 P. Wms. 388; Billings v. Taylor, 10 Pick. 460; Coates v. Chever, 1 Cowan, 460; Bagot v. Bagot, 32 Beav. 509, 15 M. R. 190.

[6] Irwin v. Covode, *supra;* Neel v. Neel, *supra.*

[7] Elias v. Snowden Slate Quarries, L. R. 4 App. Cas. 454; Linn's Appeal, 31 Pa. St. 44; Hamilton v. Eli, 4 Gill, 54.

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so far as the rights of the life tenant are concerned. And in the absence of express permission to do so he will not be permitted to work in either.[1] Of course, it goes without saying that when such a rule as this prevails, any mining whatever by a life tenant would be considered waste.

§ 949. Permissive waste — Mining by tenant in tail in new mine.—To the foregoing sections should be added the observation, that it has frequently been decided that the exceptions referred to apply only to permissive waste and not to the destruction of the estate itself, and will not authorize malicious, unreasonable or extravagant use of the property.[2] But, apart from this limitation, as we have already seen, and not to repeat too much, it is a part of the purpose of ownership of a mine that the same shall be worked. Hence, there can be no question of the right of the life tenant to do so.[3] And notwithstanding the very able opinion of the West Virginia court, cited in a preceding section,[4] and the strength and value of that rule as a general one, where an estate is entailed it must be quite plain that the tenant in tail occupies a stronger position than the ordinary life tenant, and because of this he ought to be allowed to open a new mine. Because if one tenant in tail cannot open a mine, another tenant of the same degree cannot, and the mine must remain unopened.

§ 950. May not destroy estate by permissive waste — When may open abandoned mine — Question of fact.— What is or is not waste, in a given case, is often a very close question of fact; likewise, whether working a mine formerly abandoned is *per se* waste raises a similar question. But it is believed that the rule of permissive waste will in no case

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 48; Swinton v. Roxburg, Fac. Coll. Jan. 17, 1816; Ersk. 2, 9, 57.

[2] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 48, 49; Packington v. Packington, 3 Atk. 215; Vain v. Lord Barnard, 2 Vern. 738; Abraham v. Bub, 2 Freem. 53; Bishop of London v. Web, 1 P. Wms. 537; Aston v. Aston, 1 Ves. 264; Piers v. Piers, id. 521; Rolt v. Lord Somerville, 2 Ab. Eq. 759; Strathmore v. Bowers, 2 Bro. 88.

[3] Bainb. Mines, *supra*, p. 49; Tracy v. Tracy, 11 Vern. 23; Aston v. Aston, *supra*.

[4] *Ante*, § 945.

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justify a wanton or complete destruction of the estate.[1] The line separating permissive waste from acts for which the life tenant may be made to answer is often not sharply drawn and dependent upon the facts of the particular case. If the operation complained of is merely opening up a mine which has been permitted to lie dormant or abandoned for the good of the estate, and not finally, it is not waste of such character as to make the life tenant answerable.[2] And it is believed the same rule applies to reasonable and proper mining in any case.

§ 951. Petroleum — When considered mineral, and when as income and not of corpus.— It has been held that oil produced from wells on land leased for oil purposes, during the owner's life, is income and not part of the corpus of the estate, as between life tenants and remaindermen.[3] But in the same state, in a conveyance of land a reservation of timber and all minerals has been held not to include petroleum oil.[4] But this case was not followed in a later case, where the court held that petroleum is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may with propriety be called mining lands.[5]

§ 952. Customs affecting rights of life tenants.— In some parts of England the rights of life tenants, as well as all other limited estates, are affected by local customs. Thus, if the custom can give a copyhold tenant a general right to minerals, it may also give him a limited ownership over them.[6]

[1] Bainb. Mines (1st. Am. from 3d. Lond. ed.), pp. 48, 50; Louis Bowles Case, 11 Co. 59; Pyne v. Dor, 1 T. R. 55.

[2] Bagot v. Bagot, 32 Beav. 509, 15 M. R. 130. See also *ante*, § 941.

[3] Woodbrin's Estate, 27 W. N. C. 305, 25 L. R. A. 223.

[4] Dunham v. Kirkpatrick, 101 Pa. St. 43.

[5] Gill v. Weston, 110 Pa. St. 318.

[6] Bainb. Mines (1st Am. ed.), Dallas' Notes, pp. 7, 5; Hayden v. Smith, 13 Col. 68, 2 Brownl. 319; Ashmead v. Ranger, 1 Lord Raym. 551, 3 Salk. 638; Stephenson v. Hill, 3 Burr. 1278; Doe v. Huntington, 4 East, 271; Brown v. Rawlins, 7 East, 409; Bishop of Winchester v. Knight, 1 P. Wms. 406; Rowe v. Brenton, 3 Barn. & Cresw. 737; Mardner v. Elliott, 2 T. R. 746; Bowser v. McLean, 2 De G. F. & J. 415.

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CHAPTER IV.

OF SEVERANCE OF ESTATES, AND HOW ACCOMPLISHED.

ARTICLE A.

By Grant or Reservation, and Herein of Definition.

§ 957. Definition of severance.
958. Same — Further definitions — Severance by exception and reservation.
959. Nature and effect of reservations or exceptions in town-site and other patents as a severance.
960. Of the crown as possessed at the common law.
961. Reservations in deeds or patents generally, including United States patent.
962. Other reservations, amounting to severance, by the United States.
963. Other grants containing reservation.
964. What included in a reservation of mines and minerals.
965. Summary.

§ 957. Definition of severance.— A severance of estates or interests exists wherever one person owns an easement or the like over the land and another owns the fee simple or the remainder. It also occurs whenever and wherever one stratum or substance beneath the surface of the earth is granted away and the surface reserved, or *vice versa*. A severance *pro tanto* is created by the government in its patent to mineral lands, whereby the right to penetrate adjoining ground is granted to the owner of a vein apexing within a mining claim, and the right is reserved out of the adjoining land; a similar right being reserved out of the claim in question. The mode of its creation, at least one mode, and at the same time a definition of it, is thus stated by an eminent law writer: "This severance is often created by deed, in which case it amounts practically to a partition on a horizontal plane, the two estates being entirely separated."[1]

[1] Morr. Min. Rights (8th ed.), pp. 169, 173. See also Humphreys v. Brogden, 1 Eng. L. & Eq. 251; Jones v. Wagner, 16 Pa. St. 529; Ashman v. Wigton (Pa.), 12 Atl. Rep. 74; Caldwell v. Fulton, 31 Pa.

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§ 958. Same — Further definitions — Severance by exception and reservation.— An exception is defined to be a clause in a deed whereby the feoffor, donor, lessor or other person making the deed doth except something out of that which he had granted before by his deed.[1] It is said that every exception must be a part of the thing granted, capable of being severed from it, and not an inseparable incident, and such that he that doth except may and doth have, and it doth properly belong to him.[2]

A reservation in a deed or other instrument of conveyance is defined to be a clause whereby a grantor creates and reserves for himself some right, interest or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving, such as a rent or easement.[3] A reservation differs from an exception in this: that the latter is ever a part of the thing granted, and is a thing *in esse* at the time, while the former is a thing newly created or reserved out of a thing demised that was not *in esse* before.[4] Lord Coke, speaking of the older doctrine of distinction between an exception and a reservation, says: "And note a diversity between an exception (which is ever a part of the thing granted and a thing *in esse*), for which *exceptis*, *salvo*, *præter*, and the like be apt words, and a reservation, which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised."[5] However, the two words are often used

St. 475; Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350; Marvin v. Brewster Iron Co., 55 N. Y. 538; Lynch v. Coviglio, 17 Utah, 106, 53 Pac. Rep. 983; Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235; Potter v. Rend (Pa.), 50 Atl. Rep. 821.

[1] Darling v. Crowell, 6 N. H. 423; Goodrich v. Eastern Ry. Co., 37 id. 167; Case v. Haight, 3 Wend. 635; 7 Am. & Eng. Ency. Law (1st ed.), p. 113.

[2] Shep. Touch. 77.

[3] 21 Am. & Eng. Ency. Law (1st ed.), p. 97.

[4] Bryan v. Bradley, 16 Conn. 482; Bowman v. Wathen, 2 McLean, 376, 3 Fed. Cas. 1076; Chenango Bridge Co. v. Binghamton Bridge Co., 3 Wall. 81; Winthrop v. Fairbanks, 41 Me. 311; Earl of Cardigan v. Armitage, 2 B. & C. 197.

[5] Co. Litt. 47*a*.

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indiscriminately.[1] As said in the Maine case cited above: "The distinction between an exception and a reservation is so obscure in many cases that it has not been observed. But that which in terms is a reservation in a deed is often construed to be a good exception in order that the object designed to be secured may not be lost."[2] In a Massachusetts case it was held that whether a particular provision is an exception or a reservation does not depend upon the use of the word reserving or excepting, but upon the nature and effect of the provision itself.[3] This latter case gives what we believe to be the true rule. Courts are constantly abandoning all adherence to mere form, and the substance of the thing is looked to for guidance. And we take it that in all cases it would make no difference whether the words employed were called an exception or a reservation,— the practice generally is to use both,— the courts would look to see what estate or interest was carved out by the words employed, and give it force accordingly.

§ 959. Nature and effect of reservations or exceptions in town-site and other patents as a severance.— Thus the reservation by the government in all town sites and railroad grants of the minerals, it is believed, is sufficient to withhold such minerals and to create a separate estate in them from the other land granted. An incident to that would be the right, without further legislation, in the grantee or patentee from the government to mine or carry away the minerals. This, while not exactly the same, is similar to certain rights —

§ 960. Of the crown as possessed at the common law. These we will proceed to examine. It was doubted in some of the early English cases, as it was doubted by the supreme court of California in the case of Dower v. Rich-

[1] 7 Am. & Eng. Ency. Law (1st ed.), p. 97; Devlin on Deeds, § 579.

[2] Winthrop v. Fairbanks, 41 Me. 311.

[3] Stockwell v. Couillard, 129 Mass. 231.

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ards, whether any right to dig was likewise reserved. In an early case it is said: "This right is also accompanied with full liberty to dig and carry away the ores, and with all such other incidents thereto as are necessary to be used for getting them."[1]

Mr. Rockwell, copying from Bainbridge without credit, speaking of this question and quoting from the case decided by Lord Hardwicke, says that this rule is disputed in a case where there was a grant from the crown of the lands, with a reservation of all royal mines, but not of the right of entry. The lord chancellor said he was of the opinion that there was by the terms of the grant no such power in the crown, and that by the royal prerogative of mines the crown had no such power. For it would be very prejudicial if the crown could enter into a subject's lands, or grant a license to work the mines; but that when they were once open it could restrain the owner of the soil from working them, and could either work them itself or grant a license to another to do so.[2] Here we find the foundation for the position taken by the California court in Dower v. Richards, and we are bound to say that it has much foundation in sound reason, and the right to invade private lands was early doubted, even in England. The right itself, of course, is not inherent to the sovereign power, and can only be defended upon the ground that there has been a carving out or reservation of the right from the estate which is claimed to be the servient one. And we believe that while the courts have been on nearly every side of the question, we shall be able to point out the true rule further on in this work.

§ 961. Reservations in deeds or patents generally, including United States patent.— As we have attempted to outline in the preceding sections of this work, we find one species of severed estate in the patents from the United

[1] Queen v. Earl of Northumberland, Plowd. 310.

[2] Rockwell, Mines, p. 515; Lyddal v. Weston, 2 Atk. 20; Bainb. Mines (1st Am. from 3d Lond. ed.), p. 26.

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States, reserving the right to penetrate the adjoining ground in following the vein on its downward course.[1] Concerning the importance of this grant, which we have considered at length elsewhere,[2] the court says: "What the defendants now ask is, in effect, the application of the common-law rule. To do this we must find some warrant for it in the statute, or at least nothing against it. If there is any right emphatically granted by the mining laws, it is one in direct contravention of the common law. The statute[3] grants to the locator of the ledge (A) the right to follow it throughout its entire depth (B); contrary to the common-law rule to so follow it 'outside the vertical lines of the surface location.' . . . These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner. Courts will not fritter them away by ingrafting into the law antagonistic common-law principles or other judicial legislation."[4]

§ 962. Other reservations, amounting to severance, by the United States.— As between the United States and its patentee, there are at least two other instances of severance of the mineral vein from the inclosing land, by reservations or covenants running with the land. One is accomplished by issuing patents for Mexican grants situated in Colorado, Wyoming, Arizona, New Mexico, Nevada and Utah,[5] for the reason that by the grant itself, as we saw in a former part of this work, the minerals are expressly reserved out of the grant. The other reservation we now

[1] R. S. U. S., § 2322; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 70, 85, 88, 89, 91; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848; Clary v. Hazlet, 67 Cal. 286, 7 Pac. Rep. 701.

[2] *Ante*, Part XI.

[3] R. S. U. S., § 2322.

[4] Tyler M. Co. v. Last Chance M. Co., *supra*.

[5] Act of March 3, 1891, establishing a court for the settlement of private land claims, etc. 1 Supp. R. S. U. S., § 917, subd. 3. 26 Stat. at L. 854. See also 10 Stat. at L. 1035, 309; 9 id., p. 115; United States v. San Pedro & Canon del Agua, 4 N. Mex. 225, 7 Pac. Rep. 337; s. c., names reversed, 146 U. S. 120.

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have in mind is one cut out of all town-site patents in a mining region, under the law as it now exists.[1]

§ 963. Other grants containing reservation.— A severance of mines is also effected by reservations or exceptions in deeds of assurance which transfer the freehold and reserve the mines. An exception is distinguished from a reservation by being a part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant.[2] They are sometimes different in legal effect, but in their creation there is no magic in words, and, if the meaning is clear, either expression will accomplish the purpose.[3]

§ 964. What included in a reservation of mines and minerals.— Without repeating what has already been said[4] as to what is generally understood to be embraced within the nomenclature of "mines and minerals," it is sufficient to say here that, in construing grants and reservations of minerals, the courts have almost invariably shown a disposition to consider the terms in their broadest sense, and to class as minerals every species of metal or mineral deposit which could reasonably be so considered.[5] The New York supreme

[1] R. S. U. S., §§ 2386, 2392; Pacific Slope Lode, 12 L. D. 686; Camera Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Lindl. on Mines, §§ 172, 812. Compare Dower v. Richards, 151 U. S. 658, 38 L. ed. 305.

[2] Devlin on Deeds, § 979; 2 Coke's Inst. 577; Loveland v. Clark, 11 Colo. 271, 18 Pac. Rep. 544.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 66, 57, 70, 131, 132, 203, 295, 299; Chetham v. Williamson, 4 East, 469; Douglas v. Locke, 1 A. & E. 743; Gibson v. Tyson, 5 Watts, 34; Kier v. Peterson, 41 Pa. St. 357; New Jersey Zinc Co. v. New Jersey Franklinite Co., 2 Beas. (N. J.) 325; Cowel v. Lammers, 21 Fed. Rep. 200; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. Rep. 186; House v. Palmer, 9 Ga. 497; Benson v. Miners' Bank, 20 Pa. St. 370; Adams v. Reed, 11 Utah, 480, 40 Pac. Rep. 720; Shep. Touch. 80, 100.

[4] *Ante*, §§ 57, 143–146. See also *post*, § 1006.

[5] See Hext v. Gill, 2 L. T. (N. S.) 291; Brady v. Brady, 65 N. Y. S. 621; Harris v. Ryding, 5 M. & W. 60; Hunt v. Peck, 1 Johns. 705; Humphreys v. Brogden, 20 L. J. Q. B. 10; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495; Hartwell v. Camman, 10 N. J. Eq. 128; Bell v. Wilson, 1 L. R. Ch. App. 303.

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court holds limestone ledges[1] to be so included. And the English case,[2] while the language is not quite so broad, holds that a conveyance of surface land, reserving all mines and minerals within and under the premises, with free ingress, egress and regress to dig, search for and take and use all mines and minerals within and under the premises, is a reservation of China clay under the surface; but the owner thereof will be restrained from mining the same when he can do so only by totally destroying or seriously injuring the surface. If minerals are reserved or granted, as the case may be, the grant must generally be held to include whatever is sought for and mined or quarried under that broad and comprehensive name.

§ 965. Summary.— It will appear from the foregoing that severed estates, and the mode by which the different estates are made under the same surface, and the general inheritance thus divided longitudinally, have become well recognized in the law. By this means each stratum may be the subject of a grant or a reservation and thus become the property of as many different owners as there are different strata. We have noticed and outlined at some length two of the ways by which this may be accomplished, namely, by reservation and by grant. Of course, the word "exception" is included in the term "reservation." While it may seem an anomaly, there is good authority indicating a trend of judicial thought to the effect that severance may likewise occur by adverse user. We will discuss that at some length in the next succeeding article.

Article B.

Severance by Adverse User.

§ 970. Preliminary — Severance by adverse user — Custom.
971. Limitations — Must be open, notorious and adverse.
972. Further limitations—Adverse user must extend to mine as such—Right barred by contract.

[1] Brady v. Brady, 65 N. Y. S. 621; and see also a further reference to this case, *post*, § 981, note 1, p. 833.

[2] Hext v. Gill, 2 L. T. (N. S.) 291.

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§ 973. Same — Evidence, question for jury — Custom — Acts of ownership.
974. Prescription — Custom.
975. Rights seldom acquired by prescription.
976. Limitation upon the custom in England.
977. No title by prescription in the United States.

§ 970. Preliminary — Severance by adverse user — Custom. — It is not pretended, as a general rule, that any but a hostile adverse entry, under claim and color of right, would, in general, be a sufficient basis upon which to predicate a title by adverse user. It is quite certain, and indeed indisputable, that an entry made under an express license or lease could not be turned into an adverse possession without surrendering the possession under which the entry was made. But in some of the mining districts of England, and in early times in this country, there grew up in many states an immemorial custom whereby there was, to a considerable extent, a general free license to explore lands supposed to contain mineral, and, if mineral was found, the right of possession followed, including the right to extract the mineral upon payment of the customary toll or royalty.[1] Where such custom exists, or where an entry is boldly made under claim of right, within certain limitations, which we will explain at some length hereafter, the rule has become fixed that a severance may be accomplished in this way.[2]

§ 971. Limitations — Must be open, notorious and adverse. — Agreeably to the general rule of adverse possession, it is well settled that in order to be effectual as the severance of one portion of the inheritance from another portion by adverse user, the possession must be open, notorious and adverse,

[1] Rogers v. Brenton, 10 Q. B. 26; Allen v. Barkley, 1 Spears Eq. 264, 14 M. R. 246; Ivimey v. Stocker, L. R. 1 Ch. App. 396; Upton v. Brazier, 17 Iowa, 153; Alderson v. Ennor, 45 Ill. 128.

[2] Barnes v. Mawson, 1 M. & S. 77; Moore v. Thompson, 69 N. C. 120; Jackson v. Olitz, 8 Wend. 440; Desloge v. Pearce, 38 Mo. 588; Wilson v. Henry, 40 Wis. 594, affirming s. c., 35 Wis. 241; Stephenson v. Wilson, 37 Wis. 482; Rowe v. Grenfel, R. & M. 375.

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under color of title or claim of right. Mere possession of the surface after a severance is not possession of the mines beneath, and neither the owner of the surface nor the sub-surface proprietor can claim the other estate merely by force of his possession of his own. This doctrine is so nearly elementary, and settled by such a great number of cases, that a complete citation of them would be taking too much space. We therefore select but a few.[1] From the foregoing it will be quite apparent that the converse of this proposition must be equally true, and hence secret mining alone will not create a right in the trespasser adverse to the real owner, and that the statute does not begin to run, either for right of possession or against a claim for damages, until the discovery of such trespass.[2]

§ 972. Further limitations—Adverse user must extend to mine as such — Rights barred by contract.—Where the owner of the surface seeks to establish title to a mine beneath it by adverse possession, under the statute, he must prove possession of the mine as such, independently of his possession of the surface, or there can be no question of adverse holdings to submit to the jury.[3] Non-user alone will not set the statute of limitations running against the real owner, in the absence of some limitation in his title paper.[4]

[1] Tyrwhitt v. Wynne, 2 Barn. & Ald. 554; Cullen v. Rich, Bull. N. P. 102; s. c., Rich v. Johnson, 2 Strange, 1142; Hodgkinson v. Fletcher, 3 Doug. 81; Hamilton v. Southern Nevada M. Co., 13 Sawy. 113, 33 Fed. Rep. 562; House v. Palmer, 9 Ga. 497; Colvin v. McCune, 39 Iowa, 502; Arnold v. Stevens, 24 Pick. 106; Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235; Plummer v. Hillside Coal & Iron Co., 160 Pa. St. 483.

[2] Lewey v. Frick Coke Co., 166 Pa. St. 336; Backhouse v. Bonomi, E. & Bl. 622, 34 L. J. Q. B. 181, 9 H. L. C. 502; Smith v. Thaclerah, 35 L. J. (N. S.) C. P. 276; Nicklin v. Williams, 10 Exch. 259; Dean v. Thwaite, 21 Beav. 621; Hunter v. Gibbons, 1 H. & N. 459.

[3] Caldwell v. Copeland, 37 Pa. St. 427; Tyrwhitt v. Wynne, 2 B. & Ald. 554. This rule applies to severed estates only. And the possession of the lessee is the possession of the lessor, as against one claiming by adverse possession. Simmons v. McCarthy (Cal.), 60 Pac. Rep. 1037.

[4] Marvin v. Brewster Iron M. Co., 55 N. Y. 538; Smiles v. Hastings, 24 Barb. (N. Y.) 44; Armstrong v.

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But where a grantor, in reserving a mineral right, couples the reservation with the stipulation that he commence digging for mines within a given time, his failure to do so has been held to bar the right.[1]

§ 973. Same — Evidence, question for jury—Custom—Acts of ownership.— In an early case in England,[2] a tenant of a freehold claimed the mines against the lord of the manor, who relied upon a reservation established, not by documentary evidence, but by acts of ownership and adverse enjoyment, as far back as the memory of living witnesses would reach, and the question of adverse enjoyment and acts of ownership for time immemorial was left to the jury. In another case the right of the tenant of the freehold, as against the lord of the manor, to have the dues of copper mines under the land, was made to depend upon acts of ownership and adverse possession of the mines and dues for more than twenty years.[3] A similar result was reached where the plaintiff claimed the mine as a "bounder" under the custom of miners, against other "bounders" showing no title to the premises.[4] But, wherever the right is claimed by adverse user, the separate estate must have been so held for at least the period of limitations.[5]

§ 974. Prescription — Custom.— In some parts of England, as we have already noticed, there are certain customs which are sufficient to justify an entry. Under those circumstances it has been correctly held that the custom and prescription are sufficient to create a severance of the minerals from the surface ownership, or *vice versa*.[6] But it

Caldwell, 58 Pa. St. 284. See also Smith v. Lloyd, 9 Exch. 522.

[1] House v. Palmer, 9 Ga. 497. See also Monroe v. Bowen, 26 Mich. 523; Perkins v. Stockwell, 131 Mass. 529. See also *ante*, § 925.

[2] Barnes v. Mawson, 1 Maule & S. 77. See also Desloge v. Pearce, 38 Mo. 588.

[3] Curtis v. Daniel, 10 East, 273.

[4] Rogers v. Brenton, 10 Q. B. 26.

[5] Arnold v. Stevens, 24 Pick. 106; Bainb. Mines, 35.

[6] See Gilbert on Tenures, p. 327; Hayden v. Smith, 13 Coke, 68, 2 Brownl. 219; Ashmead v. Ranger, 1 Lord Raym. 551; Dallas' Notes to Bainb. Mines, 37.

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ought to be observed in connection with this that the principle should be restricted rather than enlarged. It had its birth in a custom which furnished the chief reason for its existence, and in the absence of a controlling custom ought not to be sanctioned.

§ 975. Rights seldom acquired by prescription.— It seems well settled that prescription, while it will give the right to work a mine, will seldom confer an estate. Prescription is a principle derived from the Roman law, where the power to confer an estate was denied it, and from this reason and foundation flows the principle that severance cannot be so accomplished.[1] It was a familiar and well-settled doctrine under the civil law that there could be no acquisition of estate by prescription, but that it must always be founded, if differing from the ordinary grant, upon acts apparent, notorious and adverse; or, as expressed in the Roman law, *nec clam nec precario*.[2]

§ 976. Limitation upon the custom in England.— The disposition seems to be, in the later cases, to restrict rather than enlarge the right which might be acquired in the direction of a severance of one stratum or part of the inheritance from another. Thus, the right of the lessee of mines in the lands of a manor upon which the houses are situated, to work the mines under any houses, part of the manor, by paying to the occupier of the surface a reasonable compensation for the use of the surface, but without making any compensation on any other account, cannot exist by custom.[3]

§ 977. No title by prescription in the United States.— It may be laid down as a general rule, that in this country

[1] Bainb. Mines, p. 5; Wilkinson v. Proud, 11 M. & W. 33; Bourne v. Taylor, 10 East, 189; Collier, Mines, p. 79. But see Barnes v. Mawson, 1 M. & S. 77.

[2] Dig., lib. 8, tit. 5, fr. 10; lib. 39, tit. 3, fr. 1; Blanchard & Weeks, Lead. Cas., p. 621; Wheatley v. Baugh, 25 Pa. St. 533.

[3] Hilton v. Granville, D. & M. 5 Q. B. 701, 13 L. J. Q. B. 193; Bainb. Mines, 437.

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the doctrine that estates might be divided or severed by prescription has not generally obtained.[1] As we saw in the last preceding section, it has lost ground in England to the extent that it may now be said that, while an incorporeal right may be there acquired with reference to real estate, no permanent interest can ordinarily be so obtained.[2]

Article C.

Void Reservations and Grants.

§ 981. Limitations in attempted grants — Void reservations and grants.
982. The rule in Texas, and contrary doctrine.

§ 981. Limitations in attempted grants — Void reservations and grants. — Not every attempted reservation, nor every attempted grant of minerals, will operate as a severance of the minerals from the servient estate. If done by public officers, it must be authorized by law.[3] If done by individuals, it must be within the lines sanctioned by the law. Thus, one co-tenant joining in the conveyance of property cannot reserve his individual interests in the mine.[4] But it has been held that a co-tenant may sell a fractional part, if the others consent to it;[5] and passive acquiescence has been held a sufficient consent.[6] Of course, it goes without saying, that a reservation, as a general rule, which is made as large as the grant is void.[7] But in a late case in New

[1] Perley v. Langley, 7 N. H. 233.

[2] Bainb. Mines (1st Am. ed.), p. 5; Collier, Mines, pp. 79, 80; Bourne v. Taylor, 10 East, 189; Barnes v. Mawson, 1 M. & S. 77.

[3] Butte City Smoke-house Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Deffeback v. Hawke, 115 U. S. 392; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 570.

[4] Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Adam v. Briggs Iron Co., 7 Cush. 361; Duncan v. Sylvester, 24 Me. 482; Smith v. Benson, 9 Vt. 138; Hartford, etc. Ore Co. v. Miller, 41 Conn. 112.

[5] Marsh v. Holley, 42 Conn. 453.

[6] Waring v. Crow, 11 Cal. 367. But see Crane v. Campbell, 24 Cal. 634. This proposition has no application to the case of tenants in common on an unpatented mining claim on the public domain.

[7] Cowell v. Lammers, 21 Fed. Rep. 200; McLaughlin v. Powell, 50 Cal. 64; Shoenberger v. Lyon, 7 W. & S. 184; Stukeley v. Buttler, Hobart, 168.

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York, where the reservation was "all mines and minerals which may be found on the above piece of land, with the right of entering at any time to dig or carry away the same," was held a reservation of the limestone, and even though that constituted the chief value of the land, and amounted practically to a reservation as large as the grant, still the limestone was reserved and the reservation not void.[1]

§ 982. The rule in Texas, and contrary doctrine.— Under a statute of the republic of Texas reserving minerals in the following language: "No lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead or other minerals," it was held that the reservation was similar in effect to that known at the common law, and not only reserved the minerals, but also the right to enter and take them.[2]

But the United States supreme court has generally held that similar reservations carried the *corpus* of the land, and that after patent the title passes if granted in accordance with statute and procured without fraud.[3]

ARTICLE D.

Trust Estate.

§ 986. Trust estates — When may be severed.
987. The reason of the rule by Bainbridge.
988. Same — Another reason stated.
989. Going concern — Mortgagor's knowledge.
990. Mortgagor's rights.
991. Powers and duties of trustees — Must not waste — Special trustees.

[1] Brady v. Brady, 65 N. Y. Supp. 621 and cases. See also *ante*, § 964, and *post*, § 982.

[2] Cowan v. Hardeman, 26 Tex. 217, citing with approval and following Queen v. Earl of Northumberland, Plowd. 310; Earl of Cardigan v. Armitage, 2 Barn. & Cresw. 197. See also State v. Parker, 61 Tex 265; *ante*, §§ 964, 981.

[3] Barden v. Northern Pac. R. R. Co., 154 U. S. 288; Morton v. Nebraska, 21 Wall. 600, quoting and approving Polk v. Wendal, 9 Cranch, 99; Minter v. Crommelin, 18 How. 88; Reichart v. Felps, 6 Wall. 160. See also Indiana v. Miller, 3 McLean, 151, 13 Fed. Cas. 25, No. 7,022; United States v. Gratiot, 14 Pet. 526.

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§ 986. **Trust estates — When may be severed.**— At the common law the mortgaged property passed to the mortgagee, and there was some doubt, in consequence of his trust relationship to the mortgagor, as to whether he might open new mines, which was finally resolved in favor of the right.[1] Following this principle, it is now settled that a mortgagee in possession may exhaust the mine in payment of the mortgage, and may even open new mines, being accountable to the mortgagor for proper operation.[2]

§ 987. **The reason of the rule by Bainbridge.**— "With respect to mines, the mortgagee in possession, it seems, will be clearly entitled to work old mines in satisfaction of his demands, though it has been decided that he is not bound, at the utmost, to advance more money in mining speculation than a prudent owner would do. For, as Lord Eldon justly said, if he were owner he might speculate for himself as much as he pleased; the advantages, whatever they might be, would be his, and if it turned out unfortunate he would bear the loss. But could a mortgagee be required to do that? Could he be required to risk his own fortune in speculation, and incur hazard in an adventure which would ultimately redound to the benefit of the mortgagor?"[3]

§ 988. **Same — Another reason stated.**— "Where mortgaged estate is of an insufficient value to pay the mortgage, a mortgagee on entering into possession, under the common-law system, may open mines and cut timber, and he will be charged only with the net profits. A mortgagee with sufficient security undoubtedly cannot dispose of any portion of the inheritance, but if the security is insufficient, and the mortgagee is acting in good faith, the court will never in-

[1] Williams v. Medlicott, 6 Price, 496; Rowe v. Wood, 1 Jac. & Walk. 555; Thorneycroft v. Crockett, 16 Sim. 445; Hood v. Easton, 2 Gif. 692, 2 Jur. (N. S.) 729; Powell v. Aiken, 4 K. & J. 345.

[2] See authorities in last preceding note; Bainb. Mines, pp. 57, 58; Hood v. Easton, *supra;* Van Buren v. Olmstead, 5 Paige Ch. (N. Y.) 9.

[3] Bainb. Mines, pp. 55, 56, citing Rowe v. Wood, 1 Jac. & Walk. 555.

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terfere to prevent his . . . opening a mine, etc., but he does it at his own risk and peril; so that, if he incurs loss in working the mine, he cannot charge the loss against the mortgagor, and if he obtains a profit the whole of that profit must go in discharge of his mortgage debt. That is the condition upon which he speculates, but subject to that condition and speculation he is entitled to make the most of the property for the purpose of discharging what is due to him."[1]

§ 989. Going concern — Mortgagor's knowledge.— Presumptively and *prima facie*, the mortgage of a colliery includes the colliery business as a going concern, and passes the right to work the mines in satisfaction of the mortgage.[2] When a mortgagor knows that a mortgagee in possession is working mines under the mortgaged premises, and for a number of years allows the working to continue without objection or complaint, the court will not allow him to surcharge the mortgagee with the value of the ores raised by him or his lessees, or of the surface land necessarily damaged by reason of such working.[3]

§ 990. Mortgagor's rights.— Generally the mortgagor, in the absence of stipulation to the contrary, may go on mining in the ordinary way; and if not guilty of improvident mining is dispunishable for waste, and may not be restrained by injunction.[4]

§ 991. Powers and duties of trustees — Must not waste — Special trustees.— It seems that all persons, including trustees who own less than the entire fee simple

[1] Blanch. & Weeks, Lead. Cas. Mines, p. 332; Millet v. Davy, 31 Beav. 470, 31 L. J. Ch. 308, 3 Giff. 322.

[2] County of Gloucester Bank v. Rudry Nerthyr Steam Co., 1 Ch. 629, 12 Rep. 183.

[3] Blanch. & Weeks, Lead. Cas. Mines, p. 332; Millet v. Davy, 11 W. R. 176, 31 Beav. 470. But will restrain improvident waste. Irwin v. Davidson, 8 Ired. Eq. 311.

[4] Capner v. Flemington M. Co., 3 N. J. Eq. 467. See also Denn v. Kinney, 2 South. 252; Irwin v. Davidson, 3 Ired. Eq. 311; Young v. Northern Illinois Coal & Iron Co., 9 Biss. 300; Teal v. Walker, 111 U. S. 242.

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estate, are restricted in their operation and enjoyment of mining property by the rule which forbids them from wasting the inheritance; that is to say, they must generally deliver up the estate to their successors or beneficiaries in as good condition as when their estate or right attached. Following this principle, there has been grave question as to whether a trustee has the power to lease unopened mines so as to permit them to be opened.[1] Generally speaking, this must be determined from the language of the instrument by which the settlement was effected or the trust created. But when the trust is for a life or lives, the authority to lease has been held incident.[2] The powers must, in general, be exercised within the spirit if not the letter of the authority.[3] Of course, where the trust is that of a guardian, executor or special trustee under a statute, the authority found in the statute must be followed.

[1] Daly v. Beckett, 24 Beav. 114; Leigh v. Balcarres, 6 C. B. 847; Scott v. Stewart, 27 Beav. 367.

[2] Leigh v. Balcarres, *supra*.

[3] Buckley v. Howell, 29 Beav. 546; Daly v. Beckett, *supra*.

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CHAPTER V.

OF THE RIGHTS, DUTIES, BURDENS AND OBLIGATIONS INCIDENT TO SEVERED ESTATES.

ARTICLE A.

General Principles.

§ 995. Of some of the consequences of severance — Resemblance to servitudes.

996. Preliminary — Severance and its incidents.

997. Severance, how accomplished.

998. Same subject — Difference between the present rule and the common law — As many owners as there are strata.

999. Same subject — Invocation of the maxim that he who owns the soil owns upward to the skies.

1000. Some cases of severance at the early common law — Copyhold and customary lands.

1001. Severance by deed of enfranchisement.

1002. Question of the common-law presumption — General doctrine of severance — No joinder by occupancy — No running of the statute of limitations.

1003. Same — Other decisions — All attributes of property — Title may be by adverse possession.

1004. The Earl of Cardigan case — Liberal construction of reservation — Words of inheritance not necessary.

1005. Separate estates same as adjoining closes — Limitation upon incidental rights.

1006. An early English statute reserving minerals, and its construction by the court of exechequer — Fossils included.

1007. Implied and incidental rights of severed estates as viewed by the cases in this country — The doctrine of Marvin v. Brewster Iron Co. — A grant or reservation carries with it the means of enjoyment.

1008. Question for jury — Rights impliedly reserved.

1009. Particular easements — Right of way through the severed strata — Effect of severance upon superjacent and subjacent estates.

1010. Ownership of the empty space.

1011. Comments — A servient duty in each estate with reciprocal rights.

1012. Tunneling under ground of another — Pursuant to custom — Statute prohibiting.

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§ 995. Of some of the consequences of severance — Resemblance to servitudes.— Mines in this condition are held either by express grant or by exception, or by virtue of acts of ownership which have produced an adverse possession against the owner of the surface.[1] In the latter case the full right to work has been established by the acts themselves. But in all cases it is a general rule of law that when anything is granted, all the means of attaining it, and all the fruits and effects of it, are also granted. So, a grant of mines, or a reservation of them, carries with it the right to work them.[2] In such case the reservation or grant of the minerals creates a dominant estate, to which the other estate of the grantor, or the estate granted, as the case may be, is servient.[3] Further than as considered in the last preceding sentence, the consideration of dominant and servient estates is postponed to another branch of this sub-head.[4]

§ 996. Preliminary — Severance and its incidents.— Before proceeding to an examination of the several rights and duties appertaining to all the different relations of separate owners of the different estates in the same piece of land and the estates carved out of it, including the incidents of such carving out, it is best to examine the law as de-

[1] Ashman v. Wigton (Pa.), 12 Atl. Rep. 74; Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035; Lord v. Carbon Iron Mfg. Co., 58 N. J. Eq. 452; Smith v. Kenrick, 7 C. B. 515; Horner v. Watson, 79 Pa. St. 242; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126; Knight v. Indiana Coal & Iron Co., 47 Ind. 105; Heywood v. Fulmer (Ind.), 32 N. E. Rep. 574, 18 L. R. A. 491.

[2] Rowbotham v. Wilson, 8 H. L. Cas. 348, 30 L. J. Q. B. 49; Rogers v. Taylor, 1 H. & N. 828, 26 L. J. Exch. 303, 38 Eng. L. & Eq. 574; Keyse v. Powell, 2 El. & Bl. 132; Dand v. Kingscote, 6 M. & W. 174; Dyce v. Hay, 1 Macq. H. L. Cas. 305; Williams v. Gibson, 84 Ala. 228; Wardell v. Watson, 93 Mo. 107, 5 S. W. Rep. 609; Snowden v. Cavanaugh, 10 Kulp, 1; Lynch v. Coviglio, 17 Utah, 106, 53 Pac. Rep. 983; Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 862, 167; Shep. Touch., p. 89; McSwinney on Mines, p. 82; Stewart, Mines, p. 33.

[3] *Post*, arts. B and D, this chapter. See also ch. VI, *infra*, art. A.

[4] Id.; *post*, next article.

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clared by the courts relative to severance itself, and how the estate may be split into as many holdings as their are different strata in its composition; and each of the separate layers or strata becomes a subject of ownership, taxation, incumbrance, levy and sale, precisely as the surface.[1]

§ 997. Severance, how accomplished.— As we have before outlined, severance may be accomplished in several different ways, and for almost any period of time, from the shortest possible tenancy to an absolute fee simple; and may, of course, be accomplished in any way that an estate may be granted, surrendered, created or assigned; as, for instance, temporarily, as by a lease; permanently, by deed or will or by reservations in a deed. Under the latter head is included, of course, the patent of the government or sovereign, in which is reserved from the grant, as in the case of a town site, the minerals contained in it; and in a case like that of the Northern Pacific railway grant, all mines, whether known or unknown.[2]

The form of this instrument may be, of course, (a) by deed of the mining stratum, vein or ledge, reserving the soil; (b) by deed of the soil, reserving the mine; (c) by one conveyance conveying expressly, for example, the soil to A. and the mine to B.; and (d) by the grants or patents of the sovereign or government, as in the case of the town-site patents which we have examined, and railroad and other grants. Of course, the deed, or conveyance by it for a term, long or short, can create the estate by direct grant or by reservation; and all we shall have to say on this subject will be generally under one of these last two heads.[3] As was said by Jessel, M. R.: "If a freeholder grants lands excepting mines, he severs his estate vertically; *i. e.*, he grants out his

[1] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 34 Am. St. Rep. 645, 25 Atl. Rep. 597.

[2] Barden v. Northern Pac. R. R. Co., 154 U. S. 288.

[3] Ibid. See also Grubb v. Bayard, 2 Wall. Jr. 81, 11 Fed. Cas. 89; Ashman v. Wigton (Pa.), 12 Atl. Rep. 74; Caldwell v. Fulton, 31 Pa. St. 475.

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estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor."[1]

There is good authority to the effect, indeed it may be said to be settled, that when a reservation is accomplished in any of these ways, whether it is called a grant of the mineral in fee simple,[2] or whether it be called an incorporeal hereditament, the result is the same, and it carries with it the right to dig, take and carry away the particular stratum involved, which is generally the substantial thing in question, and amounts to a license irrevocable, which may be demised for a term of years or assigned in fee.[3]

§ 998. Same subject — Difference between the present rule and the common law — As many owners as there are strata. — The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata. The difficulty is to so apply the law as to give each owner the right of enjoyment

[1] Eardley v. Granville, 3 Ch. Div. 826. See also Bowser v. McLean, 2 De Gex, F. & J. 415; Caldwell v. Copeland, 87 Pa. St. 427; Scranton v. Phillips, 94 Pa. St. 15; Sanderson v. Scranton, 105 Pa. St. 469; Caldwell v. Fulton, 81 Pa. St. 475; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. St. 583, 1 Atl. Rep. 394; Hamilton v. Graham, L. R. 2 H. L. Sc. 166; Whittaker v. Brown, 46 Pa. St. 197; Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035.

[2] Lillibridge v. Lackawana Coal Co., *supra*. See *ante*, § 925.

[3] Grubb v. Bayard, 11 Fed. Cas. 89. See also Funk v. Haldeman, 53 Pa. St. 234; Massot v. Moses, 3 S. C. 168; Hartford Iron M. Co. v. Cambria M. Co., 93 Mich. 93, 53 N. W. Rep. 5; Silsby v. Trotter, 29 N. J. Eq. 233; Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871. Compare Riddel v. Brown, 20 Ala. 412; Potter v. Mercer, 53 Cal. 673; Doe v. Wood, 2 B. & Ald. 724. See *post*, Leases and Licenses, Part XIII, chs. II and III; *post*, § 1009; Shep. Touch. 89, 100.

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of his property or strata without infringing upon the rights of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners.[1]

§ 999. Same subject — Invocation of the maxim that he who owns the soil owns upward to the skies.— In the earlier days of the common law, the attention of buyers and sellers, and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was beneath or above it. His title extended upwards indefinitely and downwards to the center of the earth. The value of his estate lay, however, in the arable qualities of the surface, and with rare exceptions the income derived from it was the result of agriculture. The comparatively recent development of the science of geology and mineralogy, and the manufacture of mechanical devices for penetrating the earth's crust, have greatly changed the uses and values of its lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the country, because of the rich deposits of coal, iron and gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well cultivated farms, so that the surface has a high market value apart from the value of deposits of coal and other minerals underneath it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title by mining operations conducted by himself, and for that reason he sells or leases them to some person or corporation to be mined and to be moved. So, it often happens that the owner of the farm sells the land to one man, the iron or oil or gas to another, and the coal to another, giving to each purchaser a deed or conveyance in fee simple for his partic-

[1] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. Rep. 597; Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035; Silva v. Rankin, 80 Ga. 79, 4 S. E. Rep. 756.

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ular deposit or stratum, while he retains the surface for settlement and cultivation, precisely as he held it before. The severance is complete for all legal practical purposes. Each of the separate layers or strata, like the surface, becomes the subject of taxation, levy and sale.[1]

§ 1000. Some cases of severance at the early common law — Copyhold and customary lands.— At the common law, as now, severance by lease, license and copyhold were of shorter duration than a fee simple. We will leave that branch until we treat of mining leases and licenses. It was considered at an early date that the lord proprietor might grant the property in mines, but of course he could not grant what he did not himself possess — the right of entry to work them. This latter we will consider further on under the head of Reservations.[2] It may sometimes happen, however, that the lord makes a grant in fee of the minerals in copyhold lands, not subject to any special custom, to third persons, and enfranchises the lands themselves without excepting the minerals. It might be contended that the mines, as in other freehold lands, formed a definite inheritance, and that the grantees had then a right to the possession of their property. But we think the grantees would not be in the situation of parties claiming the full benefit of an unrestricted grant, inasmuch as, at the time of their grant, no right of entry could possibly be passed from a grantor, and no reservation had been made in the deed of enfranchisement which might inure to his benefit. The consequence would appear to be that the mines would be severed from the demesnes of the manor, and would form a separate inheritance as freeholds generally, but they would remain as inaccessible to the proprietor as before the act of enfranchisement. But if the grant of minerals were made for a limited period, the owners of the land would in such cases, of course, be entitled to them until the expiration of the period.[3] This doctrine was

[1] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. Rep. 597.

[2] See *post*, § 1006 *et seq.*

[3] Rockw. Mines, 522; Bainb. Mines, p. 38; Townley v. Gibson, 2 Term Rep. 701.

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substantially held in California, where a reservation was made, and it was doubted whether any means of rendering it beneficial remained in the government, which reserved the minerals.[1]

§ 1001. Severance by deed of enfranchisement.—When mines are excepted in the deed of enfranchisement, full power to own and work should be given, for otherwise it might be doubted whether he or his grantee would be in any better condition with respect to the mines than before. The exception merely operates on what he already possesses, and that part retained is, and always has been, with the owner of the soil; but it can confer nothing more than may be presumed to have been intended by the nature of the contract. The exception is always a part of the thing granted and it exists at the time of the grant. The mines may be excepted, but the right to work them should likewise be reserved. The owner of the land grants nothing to which a legal presumption may attach, but the reservation of a right to work will operate by way of contract, as the grant of a new incorporeal hereditament in favor of the old.[2] Pursuing this principle, it will be presumed, in the absence of a showing to the contrary, that the power to remove minerals from the lower strata was intended to be granted or reserved to the use of such strata, as the case may be.[3]

§ 1002. Questions of the common-law presumption — General doctrine of severance — No joinder by occupancy — No running of the statute of limitations.— It is obvious from the foregoing that while the old presumption, of ownership of all beneath, arising from ownership and possession of the surface, still obtains, there are essentially, in all branches of the mining law, many encroachments upon

[1] Dower v. Richards, 73 Cal. 477, 15 Pac. Rep. 105.

[2] Rockw. Mines, 522; Bainb. Mines, pp. 39, 40; Shep. Touch. 80; Fanchard v. Scott, 2 M. & R. 335; Doe ex dem. Douglass v. Lock, 1 A. & E. 744.

[3] Rowbotham v. Wilson, 8 H. L. Cas. 348, 30 L. J. Q. B. 49; Shep. Touch., p. 89 *et seq.*; *post*, § 1007.

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it, which are so self-assertive that they are in many cases wiping out and destroying the force of the presumption, so that while it exists it is only *prima facie*, and must readily yield to any showing whereby it is made to appear that there has been by grant, reservation, statute, or operation of law, a severance whereby some portion of the subjacent contents of the earth's crust has been severed from the surface ownership. Thus, the possession of one who has a title to the surface only, does not extend to or affect any subjacent severed estate. The law does not require impossibilities. It recognizes natural conditions and the immutability of natural laws. The owner of the surface cannot see, and, because he cannot see, the law does not require him to take notice of, what goes on in the subterranean estates below him with which he has no communication through openings within his inclosures or under his control. On the other hand, one who is in possession of a lower stratum is not bound to know, nor can he be affected by, what is going on on the surface above him, or in a still lower estate under his feet. The owner of each stratum must, however, take notice of what affects his own estate as far as he is in possession of or has access to it.[1]

The recognition of this principle leads to another, namely, that the possession of each estate, whether actually so or not, is presumed to be several. The owners of each are not tenants in common, as we shall soon see, and the possession of one estate is not possession of any other, except in the case of an openly declared and hostile adverse possession. Whence follows the further rule that the statute of limitations will not run in favor of the occupant or owner of one estate against the owner of another estate, by force of mere possession and occupancy alone.[2]

§ 1003. Same — Other decisions — All attributes of property — Title may be by adverse possession. — It is a settled doctrine in Pennsylvania and other states of the

[1] Lewey v. Frick Coal Co., 166 Pa. St. 536, 28 L. R. A. 283, 45 Am. St. Rep. 634. See also *post*, § 1009.

[2] Brady v. Brady, 65 N. Y. S. 621. See next section, *post*.

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Union, that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land and mineral. It has been held to be a corporeal and not an incorporeal hereditament; that the surface may be held in fee by one person, and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to separate and independent taxation also as land, when owned by a different person; that the possession of the mineral may be recovered by ejectment, and title to it may be secured by adverse possession under the statute of limitations, though not by prescription, because it is not an incorporeal right; in short, for nearly half a century it has been regarded judicially that the ownership of mineral, where it has been properly severed from the surface, is the ownership of land to all intents and purposes.[1]

§ 1004. The Earl of Cardigan case — Liberal construction of reservation — Words of inheritance not necessary. — In that case, Sir Thomas Danby, owner of the demesned lands of the manor, had feoffed the Earl of Sussex of several classes, excepting and reserving to himself and his heirs all the coals in the lands and premises, together with free liberty for Sir Thomas Danby at all times thereafter, at all times that the said Sir Thomas and his heirs should continue the owners and proprietors of the demesned lands of Farnley, to dig, possess or otherwise to mine and get coal in the said lands and premises, and to sell and carry away the same, etc. Afterwards, the manor and the demesned lands of Farnley were sold by the Danby family to the defendant, and an action of trespass was brought by the plaintiff, who was then the owner of the lands, against the defendant, for entering and working for coal. On de-

[1] Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035, 24 Am. St. Rep. 544; Caldwell v. Copeland, 37 Pa. St. 427; Scranton v. Phillips, 94 id. 15; Sanderson v. Scranton City, 105 id. 469; Delaware, L. & W. R. Co. v. Sanderson 109 id. 583, 58 Am. Rep. 743.

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murrer it was argued for the plaintiff that the heir of Sir Thomas Danby, having ceased to be the owner and proprietor of the demesned lands of Farnley, the defendants had no right to enter and dig. It was admitted that if there had been a general exception to the feoffor and his heirs, the law would imply a right to get it co-extensive with the reservation; but it was contended that the express liberty to dig the coal limited the duration of the privilege by mutual consent and contract. Bailey, J., in delivering the opinion of the court, took an elaborate view of the subject, and said that an exception was distinguished from a reservation by its being a part of the thing granted, and in existence at the time of the grant; that it was always taken most strongly against the feoffor or grantor, and that when the thing was excepted, all things that depend upon it, and were necessary for obtaining it, were excepted also.[1]

The coals were a part of the thing granted, and *in esse* at the time. The consequence, therefore, was that the property in the coals was never out of Sir Thomas Danby, feoffor, and would have remained in him and his heirs as before, without words of inheritance in the exception. And a right as incident to get the coals and do all things necessary for the obtaining of them would have been excepted also. The express liberty was induced by the words "together with," as if the intention were to increase what had preceded, not to diminish; and we take it to be a general rule that words tending to enlarge should not, unless the intention is very plain, be taken to restrain.[2]

It might be taken as clear that an express liberty did not always control what would otherwise exist, especially if the express liberty went beyond the authority implied. To give it controlling power, the intention that it should have that effect should be very plain. The special power had its necessary use, if it went beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the con-

[1] Shep. Touch. 78–100. [2] Winter v. Loveden, 1 Lord Raym. 267.

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venient use and working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent, or for a longer period, than was necessary. The express power gave great latitude in these respects; it had therefore its necessary use, though it worked nothing in restraint of the incidental right which Sir Thomas Danby and his heirs would otherwise have had.[1]

§ 1005. Separate estates same as adjoining closes — Limitation upon incidental rights.— Where mines are altogether excepted out of a grant of the surface, the owners of the two estates are in the same position as are the owners of adjoining closes who are strangers in title.[2] Neither has the right to encroach or trespass upon the estate of the other, except, of course, the right of the lower proprietor, already noticed, to use a limited portion of the surface in winning the minerals beneath. And this right to the use of surface, and any other incidental right necessary to win the coal or other stratum, must always be confined within proper limits, and in no case extended to the unnecessary use of other lands.[3]

§ 1006. An early English statute reserving minerals, and its construction by the court of exchequer — Fossils included.— There was an early English statute,[4] which it may not be out of place to notice here as tending to indicate the idea prompting the reservation by congress, in townsite grants in particular, as in the case of Nevada City, Butte,

[1] Earl of Cardigan v. Armitage, 2 B. & C. 197; Stukeley v. Buttler, Hobart, 168; Rockw. Mines, 520, 521; Bainb. Mines, pp. 39–41.

[2] Ballacorkish S. L. & C. M. Co. v. Dumbell, 29 L. T. (N. S.) 658, 5 L. R. P. C. 49; Low Moore Co. v. Stanley Coal Co., 34 L. T. 186; Caldwell v. Copeland, 37 Pa. St. 427; Neill v. Lacy, 110 Pa. St. 294.

[3] Bell v. Wilson, 1 L. R. Ch. 303; Goold v. Great Western Canal Co., 2 De G. & S. 600; Turner v. Reynolds, 23 Pa. St. 199; Dand v. Kingscote, 6 M. & W. 174; Monmouth Coal Co. v. Hartford, 1 Cr., M. & R. 614; Williams v. Gibson, 84 Ala. 228; Farnum v. Platt, 8 Pick. 339; Clark v. Vermont & C. R. R. Co., 28 Vt. 103.

[4] 55 St. Geo. III., ch. 18.

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Deadwood and many others, as also certain railroad grants. By the terms of this statute certain waste lands were taken away from the lord and allotted to the commoners. It also contained an excepting clause, which reserved all mines, minerals, etc., with the full liberty of digging, searching for and working them, and carrying away the lead ores, coal, iron, stone and fossils; and providing also, that in working the mines for minerals the lord should occupy the first stratum, without mixing it in any manner with the lower strata. The court of exchequer, speaking through Parke, B., held that the act must be construed with reference to the title in the lord, and that a stratum of stone was within the reserving clause as a mineral, or included by force of the word "fossils," and the right to carry away was also given.[1] And this is substantially the holding of courts generally.[2]

§ 1007. Implied and incidental rights of severed estates as viewed by the cases in this country — The doctrine of Marvin v. Brewster Iron Company — A grant or reservation carries with it the means of enjoyment.— In an early and ably-considered case in New York, the facts showed that Parks, who originally owned the entire estate, severed it by a conveyance to Downs containing the words: "Reserving always, all mineral ores now known or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked, on the most convenient route to and from." Downs conveyed to Bailey by deed containing the following: "Reserving always all minerals in or on said premises;" the title, through various mesne conveyances, containing the last reservation, came to the plaintiff, Marvin. Parks conveyed the minerals thus reserved to Pender, who, in turn, conveyed to the defendant iron company. The action was to restrain the defendant iron company from carrying on its mining operations underneath and upon plaintiff's lands, alleging a

[1] Earl of Ross v. Wainman, 1 M. & W. 859, 10 M. R. 398.

[2] See *ante*, § 964, and notes.

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wrongful use of the surface and various items of damage.[1] The questions involved were necessarily to what extent a grant of such magnitude was valid, and what, if any, incidental rights were necessarily included in the reservation. It was contended that the reservation, being as large as the grant, was absurd and repugnant, and therefore void. The opinion was by Judge Folger, who carefully and in his able manner reviewed all the authorities, English and American, and from the opinion we make the following extracts:

"There is no doubt of the intention of the parties to the conveyance. It was to keep in Parks and his future assigns, unconveyed to Downs and his assigns, all that which the meaning of the clause, had it been framed with strictest technicality, would have saved from the operation of the granting part of the deed.[2] . . .

"A reserve of minerals and mining rights is construed as in an actual grant thereof. It differs not whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface.[3] . . .

"A reservation of minerals and mining rights from a grant of the estate, followed by a grant to another of all that was first reserved, vests in the second grantee an estate as broad as if the entire estate had first been granted to him, with a reservation of the surface.[4] . . .

"Though a reservation is to be construed most strictly against the grantor, still there will be retained in him all that it was the clear meaning and intention of the parties to reserve from the conveyance."[5]

The strength of the foregoing principles is well established, and, we take it, cannot be gainsaid. The further

[1] Marvin v. Brewster Iron M. Co., 55 N. Y. 538. See also Hext v. Gill, 7 Ch. App. 699, 700.

[2] Citing Bridger v. Pearson, 45 N. Y. 601; Whittaker v. Brown, 46 Pa. St. 197.

[3] Citing Shep. Touch. 100; Dand v. Kingscote, 6 M. & W. 174; Williams v. Bagnell, 75 W. R. 272; Walker v. Harker, 7 M. & W. 78.

[4] Citing Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 105.

[5] Marvin v. Brewster Iron Co., *supra;* Harris v. Ryding, 5 M. & W. 60.

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well settled rule was recognized in that case, one to which we have already referred in this work and shall again refer, namely, that when a grant or reservation is made in a writing and nothing is said as to the means of enjoyment, the means of attaining it and all the fruits and effects are likewise granted or reserved, as the case may be, as incident to the estate;[1] and a grant of minerals *in situ* is governed by this rule, whereby the right to obtain them will pass, or be reserved whether expressed or not; and this includes the right to penetrate the earth with all needful shafts or other openings and remove the substance belonging to the mineral estate.[2]

By an exception the whole grant is not to be frustrated, and this rule was recognized in this case to the extent of saying, what is recognized as the general rule, that an exception as large as the grant is void. But in a later case in the same state, while this rule was recognized, it was also held, and correctly, that the whole instrument must be subordinated to the controlling rule of construction, whereby the essential intent of the parties must not be frustrated. Thus where the reservation was of all "mines and minerals," it was held to include limestone ledges rising above the land, even though they comprised its chief value.[3] And these rights being separate, it is well settled that the statute of limitations will not run in favor of either estate.[4]

§ 1008. Question for jury — Rights impliedly reserved. So an express grant of all the minerals and mineral rights in a tract of land is by natural implication the grant also of the right to open and work the mines, and to occupy for those purposes as much of the surface as may be reasonably necessary. And this right is not limited by a special grant of certain timber and water privileges and right of way.

[1] Marvin v. Brewster Iron Co., 55 N. Y. 538; Shep. Touch. 89, 100; Bacon's Abridgment, Grants, § IV, subd. 1.

[2] Goold v. G. W. D. Coal Co., 12 L. T. 842; Rogers v. Taylor, 1 H. & N. 706; Marvin v. Brewster Iron Co., *supra*.

[3] Brady v. Brady, 65 N. Y. S. 621.

[4] Id.

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Such specifications tend rather to strengthen the implication of the right to occupy the surface. Improvements are reasonably necessary for the profitable working of the mine, and for this purpose whether they pass by deed or reservation are questions for the jury.[1] There is some respectable authority which disputes the greater weight of authority, to the effect that the right of way through the surface ground may be granted or excepted, by necessary implication, with the lower strata granted or excepted; these cases holding that it requires an absolute conveyance to accomplish this result. But, as we have seen,[2] the great weight of authority is in favor of the implied right.

§ 1009. Particular easements — Right of way through the severed strata — Effect of severance upon superjacent and subjacent estates.— We have attempted to outline, in the preceding sections, principles from which may be deduced the general rule, to the effect that the surface proprietor has, by necessary implication, a right of way through a stratum severed from his estate, to reach any stratum beneath that belonging to the surface owner. Much of the confusion of thought upon this subject arises from a misconception of the character of the several and severed estates.

In a well considered case in Pennsylvania, which we have before had occasion to cite,[3] the law is laid down

[1] Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350. See also McIntyre v. Buell, 10 N. Y. S. 332; Dietz v. Mission Transfer Co. (Cal.), 25 Pac. Rep. 423; s. c., second appeal, 95 Cal. 92, 30 Pac. Rep. 380; Brady v. Brady, 65 N. Y. S. 621.

[2] See *ante*, §§ 960–964, 1007.

[3] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. Rep. 597. See also Penn. Gas Coal Co. v. Versailles Fuel Gas Co., 131 Pa. St. 522, 19 Atl. Rep. 933; Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453; Acton v. Blundell, 12 M. & W. 324; Wheatley v. Baugh, 25 Pa. St. 528; Haldeman v. Bruckhart, 45 Pa. St. 514; Cumberland Iron Co. v. Kenyon, L. R. 6 Ch. Div. 773; Smith v. Kenrick, 7 C. B. 505; Wilson v. Wardell, L. R. 2 App. Cas. 95; Crompton v. Lea, L. R. 19 Eq. 115; Messinger's Appeal, 109 Pa. St. 285, 4 Atl. Rep. 162.

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in a very able line of reasoning in the following words: "As against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner.

"So far our way is clear of difficulty, because the several owners of mineral deposits are exercising their right to have access to their several estates against their vendor. Our question is over the right of the vendor to reach strata underlying the stratum which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal, his estate . . . reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by those limits. It is impossible for him to reach his underlying estate except by puncturing the earth's surface and getting down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature."

The right of a mine operator to tunnel under the property of another will be discussed in a later section.[1]

§ 1010. Ownership of the empty space.—The Pennsylvania doctrine, as we have seen, is predicated upon the principle, as a general rule, that the severance lasts only during the enjoyment of the particular estate; that is, in the case

[1] See § 1012, *post.*

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of coal or other stratum during its removal. It seems equally clear that the right of way through all intermediate spaces is essentially and impliedly reserved; that is, speaking with reference to a particular stratum, for instance, in parting with that alone he does not part with any of the subjacent or superjacent strata, and for that reason it cannot be said that he should be denied the enjoyment of any particular stratum which he has not parted with, nor the means of access to and of enjoying it. As was said by the court: "He gave no title to any of the strata underlying it, and it is not to be supposed for a moment that the grantor parted with, or intended to part with, his right of access to it. We are of opinion that he has such right of access; the only question is how that right shall be exercised, by what authority and under what limitations."[1]

Pursuing the same thought, it would seem that he would have the right through the empty space, independent of the question of the ownership of that space.

In cases where the transfer of the stratum is absolute, and no question arises as to any reverter of the space, there has been some contrariety of opinion as to the ownership of the empty space. Independently of the question of its usefulness for any other purpose, the further question has been presented to the courts as to whether, after the removal of the stratum, the owner of such stratum possesses such an interest and ownership in the space formerly so occupied as that he may use or employ it to reach a continuation of the same stratum, or another stratum in the same or adjoining land. The courts seem to hold in favor of such right.[2] The correctness of this, we take it, cannot

[1] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. Rep. 597. See also Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453, and cases there cited. Compare Pomroy v. Salt Co., 37 Ohio St. 520.

[2] Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, citing with approval Hamilton v. Graham, 2 H. L. Sc. 166; Proud v. Bates, 34 L. J. Ch. 406; Bowser v. McLean, 2 De Gex, F. & J. 415; Eardley v. Granville, L. R. 3 Ch. Div. 826.

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be doubted in cases where the severance is complete and the title absolute, subject of course to the same incidental rights of which we have spoken.

§ 1011. Comments — A servient duty in each estate with reciprocal rights.— The doubt was expressed by the California court, as we have seen, as to whether the reservation of the minerals in the Nevada town-site patent could be effectual for the reason that the means of enjoyment was not reserved. We have taken occasion to say, and the authorities authorize the broad statement, that the law nowhere stultifies itself to the extent of permitting a reservation to be made, or an estate to be granted, without the means of enjoyment attaching in either case.

With reference to the matter in hand, of the right of way through a servient estate, we take a still stronger view, especially where the right is only co-extensive with the removal of the strata. Before the removal of the coal the particular stratum, as we have seen, being the only thing assigned, conveyed or withheld, it is the only thing belonging to that particular owner, and an adjacent or superjacent stratum may belong to the sovereign proprietor or to any other grantee of his; and the particular stratum in question not only owes servitude to the surface as he again in turn owes it the servitude of a right of way, but it owes a servitude to the underlying strata within the same bounding planes, and that, too, whether the coal or other mineral has been removed or not. For what applies to a stratum of coal, of course, in reason applies to a stratum of iron ore or other mineral. The grant, reservation or exception by which the reservation is accomplished in itself tells the entire story and creates a covenant that runs with the land in respect of every stratum reserved or granted, and the purchaser of it, or any one of the several estates, takes it with this covenant and this servitude.

So, with entire respect to the supreme court of California in the case of Dower v. Richards, we say that the Nevada

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town-lot proprietor took the estate in the surface land coupled with the reservation, as it did likewise charged with a servitude, by means of which the minerals reserved could be taken from the soil by any one seeking in a lawful way to become the grantee of the government.[1]

§ 1012. Tunneling under ground of another — Pursuant to custom — Statute prohibiting.— The right of a mine owner to tunnel under the property of another has been considered in two aspects by the supreme court of California. The first was an early case, where plaintiff, who was the owner of certain placers, called "back claims" because of their position with reference to the "face" of the hill, claimed the right to tunnel under the ground of defendant's front claims for the purpose of working his claims at bedrock, and prayed for an injunction restraining the interference with such right. The court held that he had this right established by custom.[2] In the latter case, the defendant held title to a town lot under the Nevada City town-site grant, which reserved all known minerals. Plaintiff, by running a tunnel under this lot, undertook to work a quartz vein, which it was claimed was known to exist at the date of the town-site patent, and therefore reserved. The supreme court held that the owner of the lot held all except the part in which the minerals were situated in fee simple, and, in the absence of express statutory authority, no one could tunnel under the land for the purpose of working the minerals except by contract with the owner.[3] In other words, that while the minerals were reserved, the right to work them was not. They must lie there idle and unworked for all time, no matter how valuable, unless, forsooth, the owner of the town lot, which may be practically valueless, can be prevailed upon to give

[1] See also *post*, § 1013.

[2] Bliss v. Kingdom, 46 Cal. 651.

[3] Dower v. Richards, 73 Cal. 477, 15 Pac. Rep. 105; s. c., 151 U. S. 658. See also Dower v. Richards, 64 Cal. 62.

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his consent. This decision has been noted elsewhere,[1] and we will not notice it further here.

The legislature of Colorado has taken a chance at this point, together with all the rest in the category, by enacting a provision that no person shall mine under the buildings of another without first securing the surface owner against all damages.[2]

Article B.

Surface Support.

§ 1016. Rights and duties resulting from severance — General observations.
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1020. Surface support in general.
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1022. Same subject — Right held to be absolute.
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1030. Common-law right controlled by conveyance, but sometimes only limited — Surface defined.
1031. Other effects of covenants — Convenient working — Similar rights — Usual and incidental rights.
1032. Right may be conveyed away.
1033. When agreement of parties controls and when compensation allowed.

§ 1016. Rights and duties resulting from severance — General observations.— A severance having been created and established in any of the ways pointed out in the fore-

[1] *Ante*, §§ 212, 960, 1011.

[2] Mills' Ann. Stats., § 3131; Laws 1861, p. 166, § 3. See *post*, § 1018.

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going, each estate carved out becomes the subject of ownership, bargain and sale, separate from the other. The mineral estate becomes the dominant one, and generally the last one created is superior in right; and, subject to the exceptions hereinafter pointed out, every previously-existing estate owes a servient duty to such dominant estate.[1] But there are exceptions to the rule above stated and circumstances under which the relative rights of the parties become reversed; and the mine owner, or other subsurface claimant, owes the duty of surface support to the surface owner.[2]

§ 1017. Definition.—The particular easement or servitude with which we have to deal may be defined to be an easement appurtenant, a covenant, the right running with the land, such as was denominated at the civil law as *prædium serviens*. With easements in gross we will have nothing to do in this branch of our subject. And the easement with which we have to deal may be defined to be the privilege, without profit, which the owner of one neighboring tenement hath of another, existing in respect of other several tenements, by which the servient owner is obliged to suffer to be done or not do something on his own land for the advantage of the dominant owner. It is a right, easement or servitude which one proprietor has to some profit, benefit or beneficial use out of, in or over the estate of another proprietor.[3] The rights with which we have to deal are scarcely what can generally be called an easement; they are more in the nature of profits *a prendre*.[4] As was said by Lord Wensleydale: "I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own

[1] Lillibridge v. Lackawana Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035.

[2] See *post*, next section; also §§ 1018–1020.

[3] 6 Am. & Eng. Ency. Law (1st ed.), p. 139; Tabor v. Bradley, 18 N. Y. 109, 3 Kent's Com. 528; Boston Water Power Co. v. Boston & Worcester Ry. Co., 16 Pick. 522; Knecken v. Voltz, 110 Ill. 264; Manderbach v. Bethany Orphans' Home, 1 Cent. Rep. Penn. 402; Hills v. Miller, 3 Paige (N. Y.), 254; Ritger v. Parker, 8 Cush. 145.

[4] Gale, Easem., p. 1.

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property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment."[1]

§ 1018. Of natural right — Recognized by statute. — It may be laid down as axiomatic that the owner of an estate in land has, *prima facie*, the right, to the extent of his estate, to all the incidents and appurtenances necessary to the quiet, successful and peaceable enjoyment of the same, unless there is something in the nature of a covenant in the grant or instrument by which he secures title, in some way limiting or qualifying this natural right. So, *prima facie*, the owner of the surface is entitled to support from the subjacent strata, and, if the owner of the minerals works them, it is his duty to leave sufficient support for the surface in its natural state.[2] And of a common right, the mining estate was held in Pennsylvania to be servient to the surface, to the extent of sufficient support to sustain it, and there could be no custom to the contrary. The reason given for this conclusion was that the business of mining in the western part of the state was of too recent date to give such a custom the age necessary for its validity. Moreover, any such usage or custom would lack the essential element of reasonableness.[3] In some of the states this right is expressly recognized by statute, and in such cases the miner is required to give security for surface and subjacent support.[4] It is sufficient to say that the legislation is crude and uncertain, and not free from constitutional objection, since there is no reason that special protection should be guaranteed in such cases.

[1] Backhouse v. Bonomi, 9 H. L. Cas. 513; affirmed, Bonomi v. Backhouse, El. Bl. & El. 646, 96 E. C. L. 646. See also Caledonian Ry. Co. v. Sprot, 2 Macq. H. L. Cas. 449.

[2] Harris v. Ryding, 5 M. & W. 60; Humphreys v. Brogden, 12 Q. B. 735; Smart v. Morton, 5 E. & B. 30, 13 M. R. 655.

[3] Jones v. Wagner, 16 P. F. Smith, 429; Horner v. Watson, 79 Pa. St. 242, 4 M. R. 1.

[4] The statutes will be found in the appendix—Colorado, Idaho, the Dakotas and Wyoming. Missouri requires an indemnity for working beneath certain cities. See Appendix, Missouri Statute. See also *ante*, § 1012; *post*, § 1023.

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§ 1019. Right cannot be defeated by custom.— As was noted in the last section, this right cannot be defeated by custom, because one of the essential elements of a valid custom must be that it is so widely known, and so universally recognized, that all men contracting in the vicinity, or being controlled in their mining operations in any manner, are presumed to act or contract with reference to it. And where one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil, and the plea of any custom to the contrary cannot be entertained.[1]

§ 1020. Surface support in general.— It is now established by the great weight of authority, that, as a general rule of law, the owner of the surface is entitled to absolute support, not as an easement of right depending on a supposed grant, but as a proprietary right at common law. Whenever the ownership between the surface and the mines beneath becomes severed, either by grant of the mines only, or a grant of the lands with an exception of the mines, it is presumed by the law that neither of the separate owners has the right to destroy or damage the property of the other. The right of a surface owner has been likened to that of an owner of an upper story of a house who holds his tenement with an implied right to support from the owner of the lower story.[2] A clear statement of the general rule

[1] Coleman v. Chadwick, 80 Pa. St. 81; Horner v. Watson, 79 id. 242; Jones v. Wagner, 16 P. F. Smith, 429.

[2] Humphries v. Brogden, 1 Eng. L. & Eq. 241, 12 Q. B. 739, 20 L. J. Q. B. (N. S.) 10; Greenwell v. Low Beechburn Coal Co., 2 Q. B. 165, 66 L. J. Q. B. (N. S.) 643; Harris v. Ryding, 5 M. & W. 59; Earl of Glasgow v. H. & C. Alum Co., 8 Eng. L. & Eq. 131; Rowbotham v. Wilson, 8 H. L. Cas. 348; Pennington v. Galland, 9 Exch. 1; Smith v. Darby, L. R. 7 Q. B. 716; New Moss Colliery Co. v. Manchester M. & R. Co., 1 Ch. 725, 66 L. J. Ch. (N. S.) 381; Haines v. Roberts, 7 El. & Bl. 625; Hext v. Gill, 27 L. T. (N. S.) 291, 20 W. R. 957; Dugdale v. Robertson, 3 Kay & J. 695; Hunt v. Peck, 1 Johns. Eng. Ch. 705; Wakefield v. Earl of Buccleuch, L. R. 4 Eq. 613; Smart v. Morton, 5 El. & Bl. 30; Rogers v.

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was thus made by the supreme court of Pennsylvania in an early case: "That if the owner of land grant a lease of minerals beneath the surface, with power to work and get them, in the most general terms, still the lessee must leave a reasonable support to the surface; and so, conversely, when the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon such demise, that the lessor is demising them in such a manner as is consistent with the retention, by himself, of his own right of support."[1]

Taylor, 2 H. & M. 828; Caledonian Ry. Co. v. Sprot, 2 Macq. 449; Midland Ry. Co. v. Checkley, 4 L. R. Eq. 19; Barneley Canal Co. v. Twibell, 7 Beav. 19, 13 L. J. (N. S.) Ch. 434; North Eastern Ry. Co. v. Elliott, 2 De Gex, F. & J. 423; affirmed, Elliott v. North Eastern Ry. Co., 10 H. L. Cas. 333, 9 Jur. (N. S.) 555; Proud v. Bates, 34 L. J. Ch. 406; Shaw v. Stenton, 27 L. J. (N. S.) Ex. 253; Aspden v. Sedden, 10 L. R. Ch. 394, 44 L. J. Ch. 359; Radon v. Jeffcock, 7 L. R. Exch. 379, 42 L. J. Exch. 36; Dickson v. White, 8 App. Cas. 833; Andrew v. Buchanan, 2 L. R. H. L. Sc. 286; Bell v. Earl Dudley, 13 Rep. 272, 1 Ch. 182; Corp. Birmingham v. Allen, L. R. 6 Ch. Div. 284; Wyrley & Essex Canal Co. v. Bradley, 7 East, 368; Davis v. Trehearne, L. R. 6 App. 460; Hodgson v. Moulson, 18 C. B. (N. S.) 332, 114 Eng. Com. Law, 330; Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350; Perry County Coal Co. v. Maclin, 70 Ill. App. 444; Wilms v. Jess, 94 Ill. 464; Yandes v. Wright, 66 Ind. 316, 32 Am. Rep. 109; Livingston v. Moingona Coal Co., 49 Iowa, 369; Randolph v. Halden, 44 Iowa, 327; Mickle v. Douglass, 75 Iowa, 78; Gilmore v. Driscoll, 122 Mass. 199; New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. 322; Boston Franklinite Co. v. New Jersey Zinc Co., 13 N. J. Eq. 215; Burgner v. Humphey, 41 Ohio St. 340; Pomeroy v. Salt Co., 37 Ohio St. 520; Marvin v. Brewster Iron M. Co., 55 N. Y. 538; Farrand v. Marshall, 19 Barb. 380; Jones v. Wagner, 66 Pa. St. 429; Horner v. Watson, 79 Pa. St. 242; Coleman v. Chadwick, 80 id. 81; Searle v. Lackawanna & Pa. Ry. Co., 33 Pa. St. 57; Nelson v. Hock, 14 Phila. 655; Brown v. Torrenz, 88 Pa. St. 186; Scranton v. Phillips, 94 Pa. St. 15; Carlin v. Chappel, 101 Pa. St. 34-8; Williams v. Hay, 120 Pa. St. 485, 14 Atl. Rep. 379; Kistler v. Thompson, 35 Pa. St. 139; McGowan v. Bailey, 146 Pa. St. 342, 23 Atl. Rep. 387; Fairview Co. v. Hay, 17 Atl. Rep. 383; Gumbert v. Kilgrove, 6 Cent. Rep. 406; Robertson v. Youghiogheny River Coal Co., 180 Pa. St. 566, 27 Pitts L. J. (N. S.) 67, 33 Atl. Rep. 706; Pringle v. Vesta Coal Co., 172 Pa. St. 488; Hecksherd v. Sheaffer (Pa.), 14 Atl. Rep. 53; Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co., 93 Tenn. 191, 23 S. W. Rep. 1095.

[1] Jones v. Wagner, *supra;* Horner

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But there are said to be limitations upon the right of surface support. Thus, as a general rule, it is only due in the form and manner as the surface of the ground made necessary at the time of the creation of the grant or severance, and as to any building placed upon the surface thereafter, not contemplated or expressed in the grant or reservation, the subsurface owner is not liable for surface support.[1] It may, of course, be contracted away, but such contract will be confined to its own subject-matter and does not destroy the right of an adjoining proprietor to his lateral support.[2]

§ 1021. Same — The universal rule — Surface support in natural state.— This subject has so clearly crystallized into a defined and positive rule of law as to become axiomatic; and it matters not whether the right is called an easement, a servitude, or a right of property, as was said in an English case, the result is the same.[3] The owner of the land has the right, and it has always been considered as his right, to the support of the land in its natural state from his neighbor, whether subjacent or adjacent, and for this purpose it was held that all the land-owners in England, however distant, were neighbors, if their operations, in any remote degree, injured the land of another.[4]

As was said by Lord Justice James in the same case: "Whether you call it an easement or a natural right inci-

v. Watson, *infra;* Coleman v. Chadwick, 80 Pa. St. 81; Heckscher v. Sheaffer (Pa.), 14 Atl. Rep. 53; and see *post*, § 1030.

[1] Partridge v. Scott, 3 M. & W. 220; Rogers v. Taylor, 2 H. & N. 828; Humphries v. Brogden, 5 Q. B. 739, 20 L. J. Q. B. 10; Rowbotham v. Wilson, 8 H. L. Cas. 848, 30 L. J. (N. S.) 49, 6 Jur. (N. S.) 965; Wakefield v. Buccleuch, 28 L. T. (N. S.) 102.

[2] Matulys v. Philadelphia & R. C. & I. Co. (Pa., 1902), 50 Atl. Rep. 828.

[3] Jessel, M. R., in Corp. Birmingham v. Allen, 6 Ch. Div. 284, 14 M. R. 17.

[4] Wakefield v. Duke of Buccleuch, 4 Eq. Cases, 618. See also Yandes v. Wright, 66 Ind. 319, 14 M. R. 82; Jones v. Wagner, 16 P. F. Smith, 429; Horner v. Watson, 79 Pa. St. 242; Marvin v. Brewster Iron Co., 55 N. Y. 538; Dugdale v. Robertson, 3 Kay & J. 695; Harris v. Ryding, 5 M. & W. 60; Bainb. Mines, 485; Matulys v. Philadelphia & R. C. & I. Co. (Pa., 1902), 50 Atl. Rep. 828.

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dent to the property, or a right of property, it seems to me that these are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be, whether you use these terms or not, there must be the idea and the substance of a dominant and servient tenement. . . . It has always been considered as the right of the adjacent owner, or the right of the subjacent owner; it has always been considered as the right of a man against his neighbor. Those are the terms which are always expressed in all the cases." And further on, defining what is meant by neighbor and adjacent and subjacent proprietor, the learned lord justice proceeds to say: "That is the neighboring property, which in extent would, in the natural state of things, have afforded the requisite support to the dominant tenement."

Thus it seems clear that the dominant estate is any estate having the right or privilege upon any other adjacent or subjacent estate, and that wherever the condition exists, there is no doubt as to the right. The right of support *ex jure naturæ*, which the owner of the soil is entitled to receive from the minerals or other strata underneath, has within a comparatively few years received much attention in the courts of England and this country, and the rule deducible from the cases in all the courts is that, where there is any restriction or contract to the contrary, the subordinate or mining property is subservient to the surface, to the extent of sufficient support to sustain the latter, or, in default, there is a liability for damages.

§ 1022. Same subject — Right held to be absolute.— Thus, in a leading case in Massachusetts, it was held that one who digs a pit on land so that, by the operation of natural and ordinary causes which he takes no precaution to guard against, the land of another falls into the pit, is liable in an action by the latter for the injury to his land in its natural condition.[1] So where the ownership of the soil was

[1] Gillmore v. Driscoll, 129 Mass. 199, 14 M. R. 37.

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vested in one, and the ownership of the minerals in another, under a statute prohibiting the working of mines within forty perpendicular yards of the foundations of buildings, it was held that the prohibition to work within that distance was absolute, and that the miner was liable under common law rules for damages done for mining beyond that distance.[1] This we take it would be the rule in any case, independent of the statute, flowing from the general principle that he who invades the rights of another must respond to such person for all damages consequent to the invasion. And while it might be permissible in certain cases to remove all the coal or ore from certain strata, still, he who does so does it at his own risk, and must suffer the consequences of all damages flowing from such acts. As was said in an English case, the law says to him in such case, "you must pay compensation for digging the minerals under the house and not leaving sufficient support."[2]

If the owner of the coal beneath the surface undertakes to mine and remove it, and damage results to the surface which is owned by another person, either from negligence in the mining or from failure to properly or sufficiently support the surface, or from both these causes, the surface owner may recover compensation;[3] and in all cases the owner of the mine is bound to leave enough support for the surface unless the owner of the latter has released his right to the same.[4]

§ 1023. Support from adjacent and subjacent soil — A natural right.— The doctrine that the right to support of the soil by the adjacent and underlying strata, and subject thereto the correlative right to make use of such strata in any lawful, useful and reasonable manner, are *ex jure naturæ;*

[1] Haynes v. Roberts, 7 El. & Bl. 625, 13 M. R. 665.

[2] Smith v. Darby, 7 Q. B. 716, 13 M. R. 695.

[3] Pringle v. Vesta Coal Co., 33 Atl. Rep. 690, 172 Pa. St. 488.

[4] Robertson v. Youghiogheny River Coal Co., 35 Atl. Rep. 706, 172 Pa. St. 566; Kissler v. Thompson, 158 Pa. St. 139, 27 Atl. Rep. 874.

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or, in other words, the natural incidents of property not of the character of easements received the approbation of the highest courts in England in many cases.[1] The consequences necessarily are that until the owner of the subjacent strata does some act which is productive of actual and present injury to the owner of the neighboring soil, no action can lie. The mere possibility or probability of future damage is no more a ground for a remedy at law than it would be in respect to the acts done on the surface. The continuous exercise of the right itself, as it is not necessary to its establishment, cannot be an infringement upon the rights of others. Another circumstance of great weight, of course, is the fact that the abuse or excessive exercise of such a right is necessarily secret and amounts to clandestine possession.[2]

There can be no acquisition by prescription, which must always be founded upon acts apparent, notorious and adverse, or, as is expressed in the Roman law, "*Nec clam nec precario.*"[3] It is of little consequence whether we call this estate an easement, a servitude or an interest in the soil, as we have seen, and this rule is generally adopted in the United States, where it is further held as a consequence that except by grant, and perhaps by prescription, the owner of the land cannot gain any additional right of support by the erection of buildings thereupon.[4]

§ 1024. Right founded in natural justice.— It is scarcely necessary to add anything to the reasoning we have already advanced, for, as was said by the court in a well considered

[1] Rowbotham v. Wilson, 2 L. T. (N. S.) 642; Brown v. Robbins, 4 H. & N. 186; Bonomi v. Backhouse, 96 Eng. C. L. R. 622.

[2] Solomons v. Vintners, 4 H. & N. 602.

[3] Id.; Dig., lib. 8, tit. 5. fr. 10.

[4] Lasala v. Holbrook, 4 Paige, 169; Panton v. Holland, 17 Johns. 92; Farard v. Marshall, 21 Barb. 407; Thurston v. Hancock, 12 Mass. 221; Rickart v. Scott, 7 Watts, 460; Shreve v. Stokes, 8 B. Mon. 460; Charles v. Rankin, 22 Mo. 388; McGuire v. Grant, 1 Dutch. 356; Radcliffe v. Brooklyn, 4 Comst. 402. See also Hoy v. Sterrett, 2 Watts, 330; Wheatley v. Baugh, 25 Pa. St. 533.

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Massachusetts case, after stating that the right of support from adjoining soil for land in its natural state stands on natural justice and is essential to the protection and enjoyment of the property in the soil, and is therefore a right of property which passes with the soil without any grant for the purpose: "It is a natural consequence from this principle that if any injury to his soil results from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done, and the mischief thereby occasioned."[1]

§ 1025. Does not depend upon negligence or unskilfulness.— This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to superficial structures. For an injury to buildings, which is an unavoidable incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or the exercise of positive negligence, has contributed to produce it.[2] It was accordingly adjudged in the last case that if the defendant thereby excavating and carrying away the earth on her own land, caused the plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff, but not for the injury to the buildings, in the absence of negligence. While some of the recent English cases which we have mentioned, and others still more recent, seem to go to the extent of holding that the right can only arise from grant or prescription, it nevertheless exists as a natural

[1] Foley v. Wyeth, 2 Allen, 18; Thurston v. Hancock, 12 Mass. 220.

[2] Foley v. Wyeth, *supra;* Thurston v. Hancock, *supra.*

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right, prescription being a term broad enough to cover every case, as the general rule is that it presupposes a grant.[1]

§ 1026. The English doctrine — Duty to self—But others' rights respected.—Man's first duty, after that which he owes to himself and those dependent upon him, is to so use his own as not to injure his neighbor; but wherever the law enjoins a duty upon a man, it affords him like protection in the enjoyment of his property; and it likewise enjoins upon him the duty of respecting, in his acts, the rights of his neighbor, and he cannot wantonly either dig his soil so as to undermine his neighbor's property so as to deprive him of proper support, or mine out his entire stratum of coal or mineral with the same result. This has become the definitely settled rule in England, and largely followed, indeed entirely followed, so far as we are able to discover, in this country.[2] Every owner of land is entitled, as against his neighbor, to have the earth and stone in their natural state and to have the water flow in its natural direction.[3] As was said by Lord Blackburn: "The general rule of law in both cases is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract. And as a branch of that law the owner of the minerals has a right to take away the whole of the minerals in his land, if such is the natural course of user of minerals, and that a servitude to prevent such a user must be founded upon something more than mere neighborhood."[4] This last case seems to state the doctrine somewhat extremely, and yet it seems to be the true rule. It is to be observed that only those rights are spoken of which the law gives in each case.

[1] See Wyatt v. Harrison, 3 B. & Ad. 871; Partridge v. Scott, 3 M. & W. 320; Caledonian Ry. Co. v. Sprot, 2 Macq. 449; Bonomi v. Backhouse, E. B. & E. 622, 96 E. C. L. 646.

[2] Slingsby v. Barnard, 14 Jac. 430; Smith v. Martin, 2 Sanders, 400; Wilde v. Minsterly, 2 Rolle Abr. 565; *ante*, § 1020, note 1, p. 860.

[3] Gillmore v. Driscoll, 129 Mass. 199, 14 M. R. 87.

[4] Wilson v. Waddell, 2 App. Cases, 95, 14 M. R. 25.

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§ 1027. Limitations on the foregoing — Permission to work in the usual and approved way.— So a clause in the instrument authorizing the holder to work the mines in the usual and most approved manner in which the same is performed in other works of the like kind in the country, refers simply to the mode of carrying on the underground mining, but does not presuppose a custom to work the mines so as to injure or interfere with the rights of other property; nor did the words that the holder of the right should have the right to enter upon the land and carry away the minerals, and erect buildings, and do and execute all such other acts, works and things upon, in or under or above said premises as shall be necessary or convenient for the working of and carrying away of the same, enlarge the power to deal with the mines so as to let down the surface. In common right, under such circumstances, the person who owns the surface has a right to have it properly supported below by the minerals beneath it.[1]

§ 1028. Right is implied from circumstances.— There was a *prima facie* inference at common law that upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, he was demising them in such a manner as was consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he had waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise.[2]

[1] Davis v. Treharne, L. R. 6 App. Cases, 460, 14 M. R. 60; Smart v. Morton, 13 M. R. 655, 5 El. & Bl. 50; Buchanan v. Andrew, L. R. 2 Sc. App. 486; Gaines v. Virginia & A. Coal Co., 124 Ala. 394, 27 S. Rep. 477; Youghiogheny River Coal Co. v. Hopkins, 198 Pa. St. 343, 48 Atl. Rep. 19.

[2] Dugdale v. Robertson, 3 K. & J. 695, 13 M. R. 662; Richards v. Jenkins, 18 L. T. (N. S.) 487; Proud v. Bates, 15 M. R. 227, 34 L. J. Ch. 406; Hodgson v. Moulson, 18 C. B. (N. S.) 332, 8 M. R. 511. As to decree of court of record to protect surface by party having the right to remove coal, see Livingston v. Moingona Coal Co., 10 M. R. 696; s. c., 49 Iowa, 396; *post*, § 1031, note 1, p. 871.

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In all cases where the ownership of surface is in one proprietor, and the ownership of the minerals in another, it may be laid down as the settled law, in the absence of express covenant to the contrary, that the owner of the minerals has the right to remove them, but he is bound to leave sufficient minerals or other support to properly sustain the surface. As was said in a leading New York case: "There is a distinct freehold in each of them, and the subjacent lands or mineral strata must be so occupied and used as not to divest or interfere with a reasonable and proper support of the surface lands."[1] This is a right which cannot be defeated by custom.[2]

§ 1029. Ordinary and approved mining sometimes the test — Question of fact.— What is a sufficient surface support in all cases cannot be laid down as a proposition of law. This because different conditions produce different results. Hence the doctrine which obtains generally that what is or is not, in a given case, a sufficient surface support is a question of fact to be left to the jury under proper instructions. Respecting the duty itself, it may be laid down as a general rule that the law enjoins upon the servient proprietor, the duty of maintaining sufficient surface support. If they are provided by contract as to dimensions and character, of course the contract prevails. But, in the absence of contract, the law enjoins as a duty that ordinary precautions be taken. As was said by the supreme court of Alabama in a late case: "In the absence of any safe mode provided in the contract, it will be presumed that the parties intended to adopt the mode usually adopted and found safe by the miners of such coal, more especially in that general locality."[3] And again by the supreme court of

[1] Ryckman v. Gillis, 57 N. Y. 68. See also Harris v. Ryding, 5 M. & W. 60; Harkrader v. Brogden, 12 Ad. & El. 739; Smart v. Morton, 13 M. R. 655, 5 El. & Bl. 50; Buchanan v. Andrew, L. R. 2 Sc. App. Cas. 486; Brachnell v. Humphrey, 41 Ohio St. 340.

[2] Hilton v. Granville, 5 Q. B. 701; 2 Strange, 1224; Broadbent v. Wilks, 1 Willes, 360; *ante*, § 1018.

[3] Gaines v. Va. & Ala. Coal Co., 124 Ala. 394, 27 S. Rep. 477.

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Pennsylvania: "'Ordinary precautions' mean, in 'mining coal,' proper support to the overlying surface."[1] And again by the supreme court of Alabama, in a late case: "The lessee, it is true, is to mine on all the land, but when he engaged to procure the coal — not at all events, but 'by mining' for it,— it must be understood as implied that he is to mine as other persons desirous of obtaining the best results and using adequate means to achieve it, perform the same kind of work."[2]

§ 1030. Common-law right controlled by conveyance, but sometimes only limited — Surface defined.— We have outlined at some length the settled principle of the law that surface support, that is to say, the support of the surface in its natural state, is a natural right which cannot be stipulated away so as to protect the tort-feasor for his negligence; and while the subject of negligence and conveyances are not generally to be treated here, some features thereof must receive attention.

The language of Chief Justice Thompson, quoted in a previous section,[3] is equally applicable here. And, as we have seen, when the owner of the whole fee grants the minerals reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface.[4] It should be observed that the word "surface" as used in the books means not simply the geometrical superfices without thickness, but includes whatever earth, soil or land lies

[1] Youghiogheny River Coal Co. v. Hopkins, 198 Pa. St. 343, 48 Atl. Rep. 19, citing (*q. v.*) Jones v. Wagner, 66 Pa. St. 429; Horner v. Watson, 79 Pa. St. 242; Coleman v. Chadwick, 80 Pa. St. 81; Carlin v. Chappel, 101 Pa. St. 348; Robertson v. Youghiogheny R. Coal Co., 172 Pa. St. 566, 33 Atl. Rep. 706.

[2] Gaines v. Va. & Ala. Coal Co., 124 Ala. 394, citing (*q. v.*) Vincent v. Rogers, 30 Ala. 471; Grier v. Campbell, 21 id. 327; Holland v. Tenn. Coal, I. & R. R. Co., 91 Ala. 451, 8 S. Rep. 524.

[3] *Ante*, § 1020, note 1, p. 860.

[4] Coleman v. Chadwick, 80 Pa. St. 81; Horner v. Watson, 79 Pa. St. 242; Marvin v. Brewster Iron Works, 55 N. Y. 583; Harris v. Ryding, 5 M. & W. 60; Dugdale v. Robertson, 3 Kay & J. 695; Bainb. Mines, 485.

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above and superincumbent on the line. Surface, therefore, includes all which lies above the stratum under discussion.[1]

§ 1031. Other effects of covenants — Convenient working — Similar rights — Usual and incidental rights. — Where a grant contained the words "and all the privileges necessary for the convenient working, running and transportation of said coal, and disposition of excavated matter, and also all rights and privileges incident or usually appurtenant to the working of coal mines," it was said by the supreme court of Pennsylvania: "But we cannot perceive that this grant in any way compromises the grantor's right of surface support. If, indeed, the destruction of the superincumbent estate be one of the privileges necessarily incident and appurtenant to coal mining, then the said indenture does convey the right contended for. As, however, we have just determined that such destruction of the surface is in no way incidental to such mining, we must necessarily refuse our assent to the construction contended for. It is in effect but another form of a plea of a general custom or usage permissive of the removal of all subjacent support, for it is argued that when the vendor used the words 'all rights and privileges incident or usually appurtenant to the working and using of coal mines,' he did so in view of such custom, as above referred to, and that his covenant must be interpreted accordingly. The answer to all this is, that no such custom could have existed because of its unreasonableness; it could not have entered into the contract of the parties. Support is part and parcel of the reserved estate; it is of common right, and hence must pass, if at all, by express grant, and is not to be defeated by mere implication arising from language that does not import such an effect."[2]

[1] Harkrader v. Brogden, 12 Ad. & El. 739.

[2] Coleman v. Chadwick, 80 Pa. St. 81, 14 M. R. 9. See also Horner v. Watson, 79 Pa. St. 242; Baggallay L. J., in Corporation of Birmingham v. Allen, 6 Ch. Div. 284, 14 M. R. 17; Shaw v. Stenton, 28 L. J. (N. S.) Exch. 253, 2 H. & N. 858; Proud v. Bates, 34 L. J. Ch. 106.

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An express grant of all the minerals and mineral rights in a tract of land is, by necessary implication, the grant also of the right to open and work the mines, and to occupy for this purpose as much of the surface as may be reasonable and necessary.[1] Where the surface belongs to one and the minerals to another, without qualification other than the fact of severance, the owner of the minerals must leave support sufficient to maintain the surface in its natural state. The rule is well settled that when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil.[2]

§ 1032. Right may be conveyed away.— Of course, this right, like every other, can be conveyed away; and where the conveyance is of the entire soil without reference to any subjacent strata, coal or mineral, the grantee gets all the soil conveyed, and, if no reservations are made, none exist. So, it was held in Pennsylvania, that where one grants the surface of the land and reserves the mines beneath, the implied right of support to the surface which passes with the grant may, by apt words in the deed, be excepted therefrom; and where such exception has been made, the grantor or those who claim through him, may mine all the coal, even though by such mining the surface should fall in. This is but the converse of the principles stated in the beginning of this section. As was said by the court: "The man who grants the minerals and reserves the surface is entitled to make any bargain he likes. Both parties are just as much at liberty to make a bargain with reference to the coals and minerals as to make a bargain in reference to anything else. The same rule applies when one grants the surface and retains the minerals. In each case

[1] Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350; Wardell v. Watson, 93 Mo. 108, 5 S. W. Rep. 609.

[2] Wilms v. Jess, 94 Ill. 468, 14 M. R. 56. See also *ante*, § 1028, notes.

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the question is, Did the parties agree there should be no obligation in regard to surface support?"[1]

So it is that the rights and duties of the parties, where they have attempted to measure them by express contract, will be governed and limited by the exact words they have used. A covenant for compensation to the surface owner, in a deed reserving minerals, will not be construed to include the prevention of injury by undermining buildings, but must be taken as contemplating the commission of such injury.[2] And where the grant shows the intention, even though ambiguously stated, following the rule that it is construed most strongly against the grantor, the right to surface support will be held not to exist.[3]

In a late case in England it was held that the mine owner might exhaust minerals independent of surface right;[4] and in another case the same was said to be, under certain circumstances, authorized by statute.[5] But it is generally conceded, that while the right to surface support may be limited, and to some extent controlled, by contract, such contracts are generally personal to the party receiving or reserving the estate, and cannot affect his grantee or strangers without notice. Besides, there is a well-known principle of public policy which forbids such contracts to relieve parties from their liability for negligence.

§ 1033. When agreement of parties controls and when compensation allowed.— The purchaser's land, under conveyance providing expressly that buildings or improvements

[1] Scranton v. Phillips, 94 Pa. St. 15, 14 M. R. 48; Smith v. Darby, L. R. 7 Q. B. 718.

[2] Aspden v. Sedden, L. R. 10 Ch. App. 394.

[3] Williams v. Bagnall, 12 Jur. (N. S.) 987; Smith v. Darby, L. R. 7 Q. B. 716; Rowbotham v. Wilson, 8 H. L. Cas. 348; Mine Hill & Schuylkill Haven R. R. Co. v. Lippincott, 86 Pa. St. 468; Hecksher v. Shaffer (Pa.), 14 Atl. Rep. 53; Proud v. Bates, 34 L. J. Ch. 406. See also Aspden v. Sedden, *supra;* Scranton v. Phillips, *supra;* Eadon v. Jeffcock, L. R. 7 Eq. 379, 42 L. J. Ex. 36; Dixon v. White, 8 App. Cas. H. L. (Sc.) 833; Andrew v. Buchanan, 2 L. R. (Sc.) 286.

[4] Wilson v. Waddell, L. R. 2 App. Cas. 95.

[5] Buccleuch v. Wakefield, L. R. 4 H. L. 377. But see Backhouse v. Bonomi, 9 H. L. Cas. 503, 13 M. R. 677.

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may be erected upon it, the mineral and mining rights being reserved to the grantor, is entitled to support from the adjacent and underlying soil, not only for his land but for the buildings upon it.[1] But independent and apart from any such provision, the rule deducible from the authorities seems to be that surface support is due to the land in the condition at the time the severance takes place, and if the support is sufficient for that purpose any heavy buildings placed thereon, in the absence of such a contract as just mentioned, would be at the risk of the builder.[2] These matters are sometimes controlled in England by legislative enactment. Thus, where an act of parliament authorizes canal owners, for instance, to prevent adjoining land-owners from operating their mines within ten yards of the canal, the canal company may restrain such operation, but not without compensation to the land-owners.[3] And this compensation extends not only to the value of the coal in the bed, but also for profit which could only be made by digging the coal.[4]

Article C.

Subjacent and Adjacent Support — Customary and Natural Rights.

§ 1040. Adjacent and subjacent support.
1041. In general no right to destroy the surface under any circumstances.
1042. Controlled by the contract of severance, but affected by custom.
1043. Bad custom will not warrant injury.

§ 1040. Adjacent and subjacent support.— The doctrine we have attempted to outline in the preceding sections with reference to surface support in general applies with equal force to adjacent and subjacent support, and the rule deducible from the law is, with reference to the matter in hand, that, independent of contract, the general duties imposed

[1] Northeastern R. R. Co. v. Elliott, 2 De Gex, F. & J. 423; affirmed, Elliott v. Northeastern R. R. Co., 10 H. L. Cas. 333, 9 Jur. (N. S.) 555.

[2] See *ante*, § 1020, note 1, p. 861.

[3] Midland Ry. Co. v. Checkley, L. R. 4 Eq. 19.

[4] Barnsley Canal Co. v. Twibell, 7 Beav. 19, 13 L. J. M. S. Ch. 434.

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upon the miner, especially in coal regions, where there may be different estates in the same bed or vein, are not to mine his vein entirely to the line, nor yet to dig pits in the floor or foot-wall and thus injure the subjacent proprietor.[1]

§ 1041. In general no right to destroy the surface under any circumstances.— It seems equally clear and well settled that the right of surface support, likewise of lateral and subjacent support, are matters of natural right; and before it can be said that they are lost, the instrument by and under which the claim is made must make the right clearly appear, or it will be presumed not to exist.[2]

§ 1042. Controlled by the contract of severance, but affected by custom.— Where the severance is created by contract or other paper writing separate from and independent of the duty which the law enjoins, the rights of the parties will generally be measured and controlled by the writing itself.[3] But custom will assist in the interpretation

[1] Elliott v. Northeastern Ry. Co., 10 H. L. Cas. 333, 9 Jur. (N. S.) 555, 11 W. R. 604: Jeffries v. Williams, 5 Ex. 792, 1 Eng. L. & Eq. 433; Wyatt v. Harrison, 3 B. & Ad. 871; Nicklin v. Williams, 23 L. J. (N. S.) Exch. 335; 26 Eng. L. & Eq. 549. See also s. c., 10 Exch. 259; Backhouse v. Bonomi, 9 H. L. Cas. 503; Richards v. Jenkins, 18 L. T. Rep. (N. S.) 438; Hendricks v. Spring Valley M. & I. Co., 58 Cal. 190; Gilmore v. Driscoll, 122 Mass. 199; Victor M. Co. v. Morning Star M. Co., 50 Mo. App. 525; Thomas Iron M. Co. v. Allentown, 28 N. J. Eq. 27; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452.

[2] Dixon v. White, 8 App. Cas. 833 (H. L. Sc.), citing and approving Rowbotham v. Wilson, 8 El. & Bl. 123, 8 H. L. Cas. 348; Andrew v. Buchanan, L. R. 2 H. L. Sc. 286; Aspden v. Sedden, L. R. 10 Ch. 394. See also Caledonian Ry. Co. v. Belhaven, 3 Macq. H. L. Cas. 56, 3 Jur. (N. S.) 573; London & Northwestern Ry. Co. v. Ackroyd, 31 L. J. Ch. 588, 8 Jur. (N. S.) 911, 10 W. Rep. 367; Humphreys v. Brogden, 5 Q. B. 739; Robertson v. Youghiogheny R. Coal Co., 172 Pa. St. 566, 33 Atl. Rep. 706.

[3] Davis v. Trehearne, 6 L. R. 460; Coleman v. Chadwick, 80 Pa. St. 81; Jones v. Wagner, 66 Pa. St. 429; Harris v. Ryding, 5 M. & W. 60; Robertson v. Youghiogheny River Coal Co., 172 Pa. St. 566, 33 Atl. Rep. 806; Prindell v. Vesta Coal Co., 172 Pa. St. 438, 33 Atl. Rep. 690; Burgner v. Humphrey, 41 Ohio St. 340; Carlin v. Chappel, 101 Pa. St. 348; Mickle v. Douglass, 75 Iowa, 78, 39 N. W. Rep. 198.

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of the contract and in fixing the rights of the parties.[1] But customary mining means that the ordinary precautions usually taken in mining are to be observed.[2]

The rule was thus clearly stated by the supreme court of Pennsylvania in a late case: "If the owner of the coal undertakes to mine and remove it,— as he has an undoubted right to do,— and damage results to the surface, either (a) from negligence in conducting his mining operations, or (b) from failure to properly and sufficiently support the surface, or (c) from both these causes combined, the surface owner is entitled to recover compensation for such injury as he may show he has sustained."[3]

§ 1043. Bad custom — Will not warrant injury.— But from the general rule that a custom, to be effectual for any purpose, must be reasonable in itself, and of such long standing as to justify the conclusion that all people in the vicinity know of it and act with reference to it, flows the principle that bad customs, as a general rule, have no force, will not warrant injury, nor justify, in all cases, a departure from the duty to leave surface support.[4] Moreover, no custom can be invoked to set aside a special contract, but only to interpret it.[5]

[1] Curtis v. Daniel, 10 East, 272; Wakefield v. Buccleuch, L. R. 4 Eq. 613; Bell v. Earl of Dudley, 13 Rep. (Jan. 1895), 272, 1 Ch. 182; Beatty v. Gregory, 17 Iowa, 109; Hecksher v. Sheaffer (Pa.), 14 Atl. Rep. 53; Jones v. Wagner, 66 Pa. St. 429; Carter v. Philadelphia Coal Co., 77 Pa. St. 286.

[2] Youghiogheny River Coal Co. v. Hopkins, 198 Pa. St. 343, 48 Atl. Rep. 19, Horner v. Watson, 79 Pa. St. 242; Coleman v. Chadwick, 8 Pa. St. 81.

[3] Pringle v. Vesta Coal Co., 172 Pa. St. 438, 33 Atl. Rep. 690, citing (*q. v.*) Jones v. Wagner, *supra;* Horner v. Watson, *supra;* Coleman v. Chadwick, *supra;* Carlin v. Chappel, 101 Pa. St. 348.

[4] Broadbent v. Wilks, 1 Willes, 360; Blackett v. Bradley, 1 B. & S. 940; Hilton v. Granville, 5 Q. B. 701; Blewett v. Tregonning, 3 Ad. & El. 554; Constable v. Nicholson, 14 C. B. (N. S.) 230.

[5] Randolph v. Halden, 44 Iowa 327.

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CHAPTER VI.

OF WATER RIGHTS AND DRAINAGE.

§ 1050. Water, common enemy — Drainage — Flooding.
1051. When not liable for flooding — Liable for direct acts — Not generally for omission, unless negligent.
1052. The servitude which the lower mine owes to the upper and to the surface — Pumping or turning water into mine.
1053. Limitations and exceptions — Liable for negligence.
1054. Rights and duties of the upper mine owner — So use your own as not to injure others.
1055. Upper miner must not interfere with barriers.
1056. Liable for negligence.
1057. An example of the rule by Mr. Bainbridge — Not liable in absence of negligence.
1058. What seems to be the true rule deducible from the authorities — Highest proprietor must use reasonable diligence — Not liable for injury resulting from natural causes.
1059. Working to boundary — Extent of liability for.
1060. Not generally liable for natural flow.
1061. Extreme doctrine in England — Owner liable for all damages.
1062. Statutory barriers — Constitutionality upheld.

§ 1050. Water, common enemy — Drainage — Flooding.— Pursuing the principle discussed in the last subdivision relating to the duties, and in some cases servitudes, which one estate owes to another, there are circumstances in mining, where water, instead of being a necessity as elsewhere considered, becomes a source of menace and trouble, and thereby a common enemy, against which each proprietor is bound to make for himself proper provisions for drainage and against flooding. This rule is confined strictly to water coming into the mine in a natural way and in the ordinary course of mining. The authorities in the foot-note unite in saying that the application of the above principle in all its bearings forbids one to bring upon his own land on or below the surface, by aqueduct or by pumping, any

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water which he permits to flow upon and injure his neighbor. If the injury is the result wholly of natural causes, no liability results, but if from the act of the party, of course he is liable.[1]

§ 1051. When not liable for flooding — Liable for direct acts — Not generally for omission unless negligent.— And while the adjoining or upper miner must not wantonly, wilfully or negligently flood his neighbor's mine,[2] there is a servient duty placed upon the lower proprietor by the law to care for, without compensation, the water which comes to him in the ordinary course of seepage and gravitation, and for that the upper or adjacent proprietor is not liable.[3] This is but enlarging upon the controlling principle set down in the last preceding section. One miner may not turn or pump his water into his neighbor's mine, but he is not liable if it goes there by seepage or gravitation if induced or accelerated by no act of his.

[1] Rylands v. Fletcher, L. R. 3 H. L. 330, affirming Fletcher v. Rylands, 2 App. Cas. 781; Smith v. Kenrick, 7 C. B. 515; Baird v. Williamson, 15 C. B. (N. S.) 376; Firmstone v. Wheeley, 2 Dowl. & L. 303, 13 L. J. (N. S.) Ex. 361; Clegg v. Deardon, 12 Q. B. 576, 17 L. J. (N. S.) 233; Crompton v. Lea, L. R. 19 Eq. 115; Duke of Beaufort v. Morris, 6 Harr. 340; Attorney-General v. Council of Birmingham, 4 K. & J. 548; Bentz v. Armstrong, 8 W. & S. 40; Marritt v. Parker, Coxe, 460; Williams v. Gale, 3 Har. & J. 231; Harker v. Kenrick, 13 C. B. 187; Jegon v. Vivian, 6 Ch. App. 742; Shafto v. Johnson, 8 B. & S. 252.

[2] Bainb. Mines (1st Am. ed.), p. 460; Trower v. Chadwick, 6 Bing. N. C. 1, 8 Scott, 1; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452; Fletcher v. Rylands, L. R. 1 Ex. 265, 3 H. & C. 774; affirmed, Rylands v. Fletcher, L. R. 3 H. L. 330; Firmstone v. Wheeley, 2 Dow. & L. 203; Smith v. Kenrick, 7 C. B. 515; Attorney-General v. Council of Birmingham, 4 Kay & J. 528; Phillips v. Humphrey, L. R. 6 Ch. App. 770; Crompton v. Lea, L. R., 19 Eq. 115.

[3] Bainb. Mines (1st Am. ed.), pp. 455, 456, 460; Smith v. Kenrick, 7 C. B. 515, 18 L. J. (N. S.) 172; Tenant v. Goldwin, 1 Salk. 360; Lord v. Carbon Iron M. Co., *supra;* Phillips v. Humphrey, L. R. 6 Ch. App. 770; Baird v. Williamson, 15 C. B. (N. S.) 376; Fletcher v. Smith, L. R. 2 App. Cas. 781; Nichols v. Marshland, L. R. 10 Ex. 255; Jegon v. Vivian, L. R. 6 Ch. App. 742; Crompton v. Lea, L. R. 19 Eq. 115; Jones v. Robertson, 116 Ill. 543.

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§ 1052. The servitude which the lower mine owes to the upper and to the surface — Pumping or turning water into mine.— It was held in a recent case in England that the owner of a mine at the highest level has a right to work his whole mine in the manner usual and proper for getting at the minerals, and is not liable for any water which flows by gravitation into the adjoining mine from work so conducted. But he has no right, by pumping or otherwise, to be an active agent in sending water from his mine into an adjoining mine.[1] So, we take it, the upper proprietor would be required to take every reasonable precaution to prevent his debris, or any of his appliances, from passing through any aperture that might exist communicating between his mine and the lower mine, and thus injuring and annoying the subjacent proprietor; it being remembered, as we have had occasion to say elsewhere and shall repeat at some length, that the bounding planes between them are drawn vertically.

§ 1053. Limitations and exceptions — Liable for negligence.— While it has generally been held that if, in the lawful exercise of mining, the surface stream or spring is thereby cut off, for that, according to the doctrine of the leading case,[2] there would be no liability, still there is, to all such mining, a practical application of the maxim that one must so use his own as not to injure another's; and while the owner of one portion of a bed of mineral or coal has an undoubted right to get all that the vein contains from his mine, regardless of the natural consequences which might result from so doing, he may not negligently or wilfully damage his neighbor's land.[3]

[1] Baird v. Williamson, 15 C. B. (N. S.) 376, 4 M. R. 368; Rylands v. Fletcher, L. R. 3 H. L. 330; Smith v. Kenrick, 7 C. B. 515, 6 M. R. 142. See also Bannon v. Mitchell, 6 Ill. App. 17, 2 M. R. 108; *ante*, §§ 1050, 1051.

[2] Baird v. Williamson, 15 C. B. (N. S.) 376, 4 M. R. 368.

[3] Smith v. Kenrick, 7 C. B. 515; Acton v. Blundell, 12 M. & W. 324; Chasemore v. Richards, 2 H. & N. 168, 7 H. L. Cas. 349. See *post*, § 1058.

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§ 1054. Rights and duties of the upper mine owner — So use your own as not to injure others.— While, as we have seen, the upper mine owner may, as also may the lower, mine all the mineral or coal within his vein, seam or stratum, being liable only to the surface proprietor for surface support, still, it is his duty to carefully protect the subjacent owner, and he cannot wantonly allow his water or debris to find its way into the lower mine, if he can, by the use of reasonable diligence, control its flow and carry it to the surface. And the maxim "so use your own as not to injure others" controls in such cases, as it does in all cases where the surface and the minerals have been severed.[1] It is well settled that the upper proprietor may cause water to flow from his own premises into his neighbor's so as to make himself liable in an action.[2] And the rule is rather to be restricted, in relation to descending water, to that which finds its way into the subjacent mine unintentionally, as it were, on the part of the superjacent miner, where, in the course of careful and proper mining, in taking out his own coal, the water sinks below without negligence or malice on his part, even though in an increased quantity.[3]

§ 1055. Upper miner must not interfere with barriers. While the upper miner may work to the end of his claim, the custom being to leave the barrier on the rise, and to work to the end on the dip of the beds, he must not interfere with the barriers left there by the lower proprietor.[4] If he works over barriers, it is considered negligence *per se*, and he is not only responsible for the coal removed, but likewise for all resulting damage.[5]

[1] Locust Mountain Coal & Iron Co. v. Gorrell, 9 Phil. 247, 5 M. R. 129.

[2] McKnight v. Radcliff, 8 Wright Rep. 44 Pa. St. 156.

[3] See § 1056, *post; ante*, § 1052.

[4] Bainb. Mines (1st Am. ed.), pp. 456, 461; Bannon v. Mitchell, 6 Ill. App. 17; Marker v. Kenrick, 13 C. B. 187; Tillotson v. Smith, 32 N. H. 90; Mexburough v. Bower, 7 Beav. 127; Thomas v. Allentown M. Co., 28 N. J. Eq. 77; Firmstone v. Wheeley, 2 Dow. & L. 203; Shafto v. Johnson, 8 B. & S. 252.

[5] Firmstone v. Wheeley, *supra;*

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§ 1056. Liable for negligence.—It is settled beyond controversy that, while the law of natural flow or gravitation protects the upper proprietor against damage done to the lower mine owner by natural flow, it does not shield him from the consequences of his own negligence.[1] Sins of omission are not the subject of action unless the law casts a duty to do the thing omitted; but positive actions are different, as all men are presumed to intend the natural and proximate result of their actions; and hence, if they act and the act injures another, they must answer.

§ 1057. An example of the rule by Mr. Bainbridge—Not liable in absence of negligence.—Mr. Bainbridge, in his excellent work, thus lays down the rule which he asserts is founded in necessity: "The proprietors of a mill made a reservoir for collecting water, as well from their own lands as from adjoining lands of other owners. For this purpose they employed a competent engineer and a competent contractor to select the site and complete the work. There was no personal negligence on the part of the mill owners. The workmen met with some old shafts, and the contractor did not provide sufficient support to resist the pressure of the water in the shafts. These shafts communicated with old mining works, which were wholly unknown to the mill owners and the persons employed. The water penetrated into plaintiff's colliery below, which became flooded. It was held by the court of exchequer, that, in the absence of negligence and of knowledge on the part of the mill owners, they were not required to exercise unusual care, and were not liable for the injury to the mine. Bramwell, B., dissented from this judgment on the ground that the mill owners had

Plant v. Scott, 21 L. T. (N. S.) 106. See also McKnight v. Ratcliff, 44 Pa. St. 56; West Cumberland Iron & Steel Co. v. Kenyon, L. R. 11 Ch. 782; Phillips v. Humphrey, L. R. 6 Ch. App. 770. See also Webber v. Vogel, 189 Pa. St. 156, 42 Atl. Rep. 4.

[1] Baird v. Williamson, 15 C. B. (N. S.) 276; Philadelphia & Reading C. & I. Co. v. Taylor, 7 Pa. L. Rep. 127, 5 M. R. 133; Williams v. Gale, 3 Har. & J. 231; Duke of Beaufort v. Morris, 6 Hare, 340.

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caused 'foreign' water to be sent down by artificial means into the plaintiff's workings, as well as that flowing naturally from their own land; and therefore that ignorance of the facts was immaterial. On appeal this view of the case was affirmed in the exchequer chamber, where it was decided that the mill owners were liable."[1]

§ 1058. What seems to be the true rule deducible from the authorities — Highest proprietor must use reasonable diligence — Not liable for injury resulting from natural causes.— It is the duty of the highest proprietor, whether his vein be the one which continues on into his neighbor's, or whether it be an upper stratum having a communication into a lower one, to take all reasonable care of his debris and his water; but he is not carried beyond the rule of ordinary care nor made responsible for consequences not flowing from negligence or wilfulness, if he operates his mine in a careful and skilful manner, and if a loss occurs therefrom it is *damnum absque injuria*. Hence when water, following the law of gravitation, after the removal of coal or other mineral in a careful and proper manner, finds its way by percolation or through fissures, unforeseen and unknown, into the lower mine, the lower mine owner cannot complain of it as an injury done by the owner of the upper mine.[2] But the owner of the upper mine may not suffer the flow of his gangway to run down upon the lower mine, when by reasonable diligence he can prevent it. And where there are two mining operations, one owner working on the upper level and one on the lower level of the same vein, which means farther down on its dip, the owner of the upper level, operating in the most approved method and with care, is not required to control the natural flow of the water

[1] Bainb. Mines, p. 462. See also Fletcher v. Rylands, 3 H. & C. 774, L. R. 1 Ex. 265; on appeal, Bramwell's opinion affirmed, Ryland v. Fletcher, L. R. 3 H. L. 330; Trower v. Chadwick, 6 Bing. N. C. 903.

[2] Kauffman v. Griesemer, 2 Casey, 407; Locust Mountain Coal & Iron Co. v. Gorrell, 9 Phila. 247, 5 M. R. 129.

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downward; that is, such water as may percolate through fissures or otherwise, and which he cannot control by the exercise of reasonable care and prudence. And he may work his coal down to his line. In all such cases, as we have seen, he may not be negligent, but must use his own with care.[1] A mine owner will not be liable to an owner of an adjacent mine for injury occasioned to such adjacent owner, where such injury proceeds from natural causes in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine and without default or negligence.[2]

§ 1059. Working to boundary — Extent of liability for.— From what we have outlined in the preceding sections, the rule is deducible that while a miner may work to his boundary line, yet if in doing so he negligently increases the burden or flow of water upon his neighbor, or if he brings in foreign water, he is responsible for both.[3] But in Illinois it has been held that each owner may take out all his coal, that is up to the boundary line.[4] It is believed, however, that the rule would not apply where the upper boundary was necessary for protection or to assist in providing surface support.

§ 1060. Not generally liable for natural flow.— So the rule may be said to be fixed that in general the mine owner, having due regard for his neighbor's rights, is not liable for the natural flow.[5] He may not wantonly injure his neigh-

[1] Phil. & R. Coal & Iron Co. v. Taylor, 5 M. R. 138. See also *ante*, § 1053.

[2] Fletcher v. Smith, 2 App. Cas. 781. See also *post*, § 1060.

[3] Tillotson v. Smith, 32 N. H. 90; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452; Smith v. Kenrick, 7 C. B. 515; Bannon v. Mitchell, 6 Ill. App. 17; Clegg v. Deardon, 12 Q. B. 575.

[4] Jones v. Robertson, 116 Ill. 543. Compare Bannon v. Mitchell, *supra*.

[5] Fletcher v. Smith, L. R. 2 App. Cas. 781; Losee v. Buchanan, 51 N. Y. 476; Garland v. Towne, 55 N. H. 57; Kauffman v. Griesemer, 2 Casey, 407; Martin v. Riddle, id. 415; McKnight v. Radcliff, 8 Wright, 156; Douty v. Bird, 10 P. F. Smith, 48; Smith v. Kenrick, 7 C. B. 515; Marshall v. Welwood, 28 N. J. 339, 20

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bor, but, having exercised due care, his duty seems to be ended, and the lower miner in such cases should, and generally must, protect himself by proper barriers against invasion.[1] A fair statement of the law, as we view it, is thus made by Lord Hatherly: "The drainage for which miners pay is the carrying away the water from their own mine in a drift or channel into another drift or channel in their neighbor's mine, carrying it by an artificial channel. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint as against the owner of the upper mine. The owner of the upper mine has a right to work it just as he likes, and his neighbor below cannot complain unless he finds that the water has been turned into his mine by channel or artificial arrangement."[2] And the barriers left by the lower miner are not workable ground;[3] but it has been held, in a case which seems to stand alone, that the upper miner must drain to the surface if possible.[4]

§ 1061. Extreme doctrine in England — Owner liable for all damages.— What may be considered by some as an extreme doctrine was laid down by Mr. Justice Blackburn in an early English case,[5] afterwards affirmed by the House of Lords.[6] The learned justice decides, in effect, that whenever a person brings or keeps upon his land anything likely to do mischief, if it escapes, whether beasts, water, filth or stenches, must do so at his peril, being liable for all damages ensuing to his neighbor if he fails to keep it, water especially, properly on his own property. This reasoning

Am. Rep. 894; Nichols v. Marshland, L. R. 10 Ex. 255.

[1] Smith v. Kenrick, 7 C. B. 515; Bannon v. Mitchell, 6 Ill. App. 17.

[2] Phillips v. Homfray and Fothergill v. Phillips, L. R. 6 Ch. App. 770.

[3] Shafto v. Johnson, 8 B. & S. 253.

[4] Locust Mountain C. & I. Co. v. Gorrell, 9 Phila. 247.

[5] Fletcher v. Rylands, L. R. 1 Ex. 265.

[6] Rylands v. Fletcher, L. R. H. L. 330. See also Kahill v. Easton, 18 Minn. 284, 10 Am. Rep. 184; Locust Mountain Coal & Iron Co. v. Gorrell, 9 Phila. 247.

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is certainly sound and logical, and is but another way, as we view it, of stating the rule that one must so use his own as not to injure others.[1]

§ 1062. Statutory barriers — Constitutionality upheld. In some of the states there are statutory provisions requiring certain barriers to be left upon the boundary line of each claim. Such a provision has received consideration in the state of West Virginia, where the requirement was that at least five feet should be left on the line dividing the land from the adjoining land, and providing a penalty of five hundred dollars to any person injured for violation. After considering the form of action, and the fact of the remedy being cumulative, the court proceeded to consider its constitutional aspects in these words: "But it is argued by defendant's counsel that the act is an infringement of the right of private property, transcending the legislature's constitutional power. If the defendant has the right to use his own land and coal mine for all the purposes to which such property is usually applied when, where and how he may see fit, without limitation or restriction, his neighbor, the plaintiff, has an equal right in his adjoining tract. Upon each one is therefore imposed the correlative duty of so using his own land as not to injure his neighbor's or be hurtful to the commonwealth. . . . This is no undue assumption of the right to apply the police power to a subject which does not fall within it, for regulations on all these subjects have long been recognized as wholesome and reasonable, and as fit subjects for the exercise of the police power, as tending to preserve the rights of the citizen and promote the welfare of the commonwealth. The mining of coal is one of the largest industries carried on in the state. In mining, proper support and ventilation are necessary, and an ample supply of fresh air is stringently exacted by our law on the subject. This is necessary for the health and safety of the miner engaged in a dangerous em-

[1] See *post*, §§ 1074–76.

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ployment, and for that reason the public welfare requires it; but no proper system of ventilation can be maintained by any mine owner unless the area to be worked by him is isolated or bounded by a zone or rib of coal thick enough to support the roof, and to be thick enough to prevent the escape of the air, with no passways down through his dividing line which may prevent the due circulation of the air, and render due ventilation very difficult. . . . Thus, we see that this rib of solid coal not to be mined into by either of the adjoining owners was to be contributed by each in equal parts, for the mutual benefit of each, for the protection of the surface, to secure independent systems of ventilation, drainage and workings, and in aid of an industry so great and widely diffused that the state as a whole is interested therein. . . . This regulation works no hardship on one for the benefit of the other, but is impartial, just and reasonable, imposing a common burden for the benefit of all such owners."[1]

[1] Mapel v. John, 42 W. Va. 30, 24 S. E. Rep. 608, citing with approval Haigh v. Bell, 41 W. Va. 19, 31 L. R. A. 131; 15 Am. & Eng. Ency. Law (1st ed.), 593 *et seq.*; Cooley, Const. Lim. (3d ed.), top page 578. There are statutory regulations for the protection of miners, and regulating mining, in several of the states, which are set out in the Appendix.

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CHAPTER VII.

OF TAILINGS AND DEBRIS STATUTES, AND HEREIN OF DUMPAGE AND REFUSE MATTER, AND MISCELLANEOUS.

ARTICLE A.

Tailings, Debris and Dumpage in General.

§ 1070. Review of easements and of additional servitudes — What by statute and what by contract.
1071. Public use — When a judicial question.
1072. Must exercise right if claimed — When will not be enjoined.
1073. No inherent right of dumpage.
1074. Value of land immaterial.
1075. Substantial rights should not be wrongfully invaded.
1076. Tailings and debris statutes, and the general debris question.
1077. Modification of the strict riparian doctrine.
1078. Act creating the California Debris Commission.
1079. The doctrine of this article restated.

§ 1070. Review of easements and of additional servitudes — What by statute and what by contract. — It has been, and shall continue to be, our intention to avoid a discussion of the question of eminent domain, except so far as it is inseparably connected with the matter in hand. We have elsewhere noticed at length the easements and servitudes especially authorized by statute to be impressed upon the patent issued by the government and authorized to become the subject of eminent domain within the public-land states and territories.[1]

We do not desire to be understood as asserting that congress has the right to interfere with a sovereign state in respect of the subjects over which the right of eminent domain may be exercised, nor the manner of its exercise. Nor do we think that this has in any manner been attempted. Con-

[1] *Ante*, §§ 462, 463, 756. See also §§ 2323, 2329, R. S. U. S.

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gress has simply provided, as it had a right to do, that the local legislatures might enact statutory provisions regulating the exercise of the right of eminent domain over mining claims, the ultimate title to which is, until the issuance of patent, still in the United States.[1] In other words, that while, ordinarily, the right of eminent domain over property belonging to the United States may only be exercised as provided by congress, an exception is made in this case, and the local state legislature is given authority to enact provisions governing the exercise of that right over unpatented, as well as patented, mining claims. This matter has also been considered elsewhere[2] and we will make no further reference to it here.

We have also noticed at some length, in the preceding chapters of this part of our work,[3] the other easements and servitudes incidental to severed estates. We have now to deal with still another class of easements, or severed estates, not elsewhere considered.

Separate from and servient to the other estates is the right, usually acquired by contract, but in most jurisdictions, indeed wherever mining is recognized as a public use, permitted by the exercise of the right of eminent domain, for dumping ground and tailings beds and for other similar purposes.[4] But ways of necessity can in general be acquired by condemnation whether mining is recognized as a public use or not.[5]

§ 1071. Public use — When a judicial question.— There is much diversity of opinion as to whether the question, what is or what is not a public use, is a judicial or a legislative one.[6] But the best opinion and the best considered

[1] Act. Feb. 22, 1865, 13 Stat. at L., p. 441, § 9; R. S. U. S., § 910.

[2] See sections cited in note 1, *ante*, p. 886.

[3] *Ante*, this Part, ch. V, art. A, §§ 995, 1006, 1008, 1009, 1011, 1016 *et seq.*

[4] As to statutes wherein mining is considered as a public use, see *post*, Appendix.

[5] Williams v. Gibson, 84 Ala. 228, 4 S. Rep. 350.

[6] See 1 Am. & Eng. Ency. of Law, vol. 10, p. 1056, and cases there cited.

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cases lay down the rule that where the subject is not provided for by constitutional enactment, and, pursuant thereto, declared such by the legislature, the question then becomes a judicial one.[1] Primarily, however, it is a political question, and ought to be determined by the people for themselves; and it matters not whether they express their will through the constitution or through the legislature within the bounds of the constitution. Of course, under our form of government, a power not conferred by fair constitutional provision is withheld;[2] and the constitution being a limitation upon the exercise of legislative power, the warrant for legislative enactment must exist therein or the legislation is unconstitutional.[3] There are, of course, many exceptions to the foregoing rules, likewise distinctions between the federal and state constitutions; but the reader will find that subject properly treated in works upon constitutional law.

§ 1072. Must exercise right if claimed—When will not be enjoined.— Even in those states where mining is considered a public use, the taking or making use of the mining property of another without resorting to regular proceedings in condemnation does not exist, and for obvious reasons the high-handed use of one man's property by another will not be tolerated. If the legislature in its wisdom has conferred the extreme right of eminent domain upon a mining corporation, or upon individuals engaged in mining, they must resort to that remedy — it does not place the law in their own hands. An example of the fallacy of any other rule is found in a recent Utah case, where there is a statute

[1] Bliss v. Kingdom, 46 Cal. 651; Ahern v. Dubuque Lead & L. Co., 48 Iowa, 140; New Central Coal Co. v. George's Creek Coal & Iron Co., 33 Md. 537; Evans v. Heffner, 29 Mo. 141; Cleveland & Pittsburg Ry. Co. v. Ball, 5 Ohio St. 568; Brown v. Corey, 43 Pa. St. 495; Lion v. Gormley, 53 Pa. St. 261; Searle v. Lackawana & Bloomsberg R. R. Co., 33 Pa. St. 57; Waddell's Appeal, 84 Pa. St. 90; West Va. Transportation Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382.

[2] Cooley, Const. Lim. (6th ed.), p. 89.

[3] Dayton G. M. Co. v. Sewell, 11 Nev. 394.

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authorizing the taking of ground for dumping and other mining purposes, including the right of way for pipe line or for ditches for mining purposes.[1] A pipe line was laid across several mining claims of the plaintiff, and an action was brought for injunction to restrain its use, it being already there (right of way was afterwards condemned). The lower court refused the injunction, the supreme court having previously dissolved an injunction with reference to a part of the same property.[2] In upholding the judgment of the lower court the supreme court uses these words: "It does not appear that there was any other way of reaching the mine with the water, or that any (other) water was obtainable. Without the water one of the largest mining industries in the state, employing hundreds of laborers, and producing hundreds of thousands of dollars' worth of mineral annually, must be closed down and cease operations. The laying of the pipe line across this barren, valueless land caused no appreciable injury to the plaintiff. . . . To restrain the laying of the pipe line would cause defendant irreparable damage, and destroy and lay waste a mining industry of incalculable value, throw out of employment hundreds of laborers, and seriously retard and injure the people of the community and state in which the mine is located. . . . Under such circumstances, the remedy at law being complete, the plaintiff should be required to resort to such remedy."[3] With becoming deference to the court, the hardship of the situation did not justify judicial legislation. Every principle of law and justice said to the defendant, "you cannot invade my property except armed with the law and in the manner authorized by the law." This is an extreme case. Perhaps no injury was done by the decision in the

[1] R. S. Utah, 1898, § 3588. See *post*, Appendix.

[2] McGregor v. Silver King M. Co., 14 Utah, 47, 45 Pac. Rep. 1091.

[3] Crescent M. Co. v. Silver King M. Co., 17 Utah, 444, 54 Pac. Rep. 244. See also Jacobs v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Slade v. Sullivan, 17 Cal. 102; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740. Compare Edwards v. Allouez M. Co., 38 Mich. 46; United States v. North Bloomfield Gravel M. Co., 58 Fed. Rep. 625; Atchison v. Peterson, 1 Mont. 561; affirmed, s. c., 20 Wall. 502. See *post*, § 1074, p. 892.

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particular case. But, obviously, the better rule would be to require the exercise of eminent domain, and enjoin the use without prejudice to such proceedings.

§ 1073. No inherent right of dumpage.— Neither of the rights mentioned in the foregoing section is inherent. No person, natural or artificial, has the right to cover his neighbor's land with debris from his mine or mill, nor to permit any of his refuse matter to flow or be placed upon the land of another.[1] But, while this rule is emphatically true, it is one that is not absolute in the sense that the right cannot be acquired. As a general rule the right of dumpage or of flow of tailings, that is to say, the right of way for those purposes, can be acquired wherever mining is a public use. And while they will be required to respect legal rights, and to resort to the remedies the law has established, and to observe the rule which finds expression in the maxim *Sic utere tuo ut alienum non lædas*,[2] yet they will not ordinarily be restricted by the extraordinary remedy of injunction. While they may acquire the right by eminent domain, in general, they will only be liable for damages if they do not.[3] As was said by the supreme court of Alabama in the last case cited: "So, as a rule, every one must so enjoy his own property as not to offend his neighbor's equal right to enjoy his own unmolested. But this rule cannot be enforced, in its strict letter, without impeding rightful progress, and without hindering industrial enterprise. Hence, minor individual interest is sometimes made to yield to a larger and paramount good. To deny this principle

[1] Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. Rep. 1147; Robertson v. Black Diamond C. & M. Co., 47 Cal. 165; Richardson v. Kier, 34 Cal. 63; Keys v. Little York, etc. Co., 53 Cal. 724; Ralston v. Ploughman, 1 Idaho, 595; Nelson v. O'Neil, 1 Mont. 284; Harvey v. Side Silver M. Co., 1 Nev. 539; Keeley v. Green, 21 N. J. Eq. 27; Potter v. Froment, 47 Cal. 165; Elder v. Likens Valley Coal Co., 157 Pa. St. 490, 27 Atl. Rep. 545; Potter v. Rend (Pa.), 50 Atl. Rep. 821.

[2] Stein v. Burden, 29 Ala. 127.

[3] Drake v. Lady Ensley C. & I. Co., 103 Ala. 502, 14 S. Rep. 749.

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would be to withhold from the world the inestimable benefits of discovery and progress in all great enterprises of life. The rough outlines of natural right or natural liberty must submit to the chisel of the mason, that it may enter symmetrically into the social structure."[1]

All of which is absolutely true; but whatever invasion of private right becomes necessary should at least be under the form of law, i. e. in the exercise of eminent domain. Except in cases of insolvency of the invader, and a wilful and wrongful invasion of private rights, however, as a general rule the remedy by way of an action for damages ought to be a sufficient one.

§ 1074. Value of land immaterial.— No apology is meant in the last preceding section for any unwarranted attempt at invasion upon private rights. It is enough that men have the right of eminent domain in mining business. No higher right ought to be sought for or demanded. But while this is true, it is like a man's inherent right to evade the performance of his contract — he may do so, but he must answer in damages; and the same principle applies here, though it does not follow that an injunctional judgment should always result. The right of enjoyment of property of course is inherent, and it is no answer to say that the land sought to be damaged is of no value, or useless for any other purpose. While this may go in mitigation of damages it does not destroy the right. In such case a right is invaded, and this may be done only as allowed by law.[2]

[1] Drake v. Lady Ensley C. & I. Co., 102 Ala. 502, 14 S. Rep. 749. See also Hughes v. Anderson, 68 Ala. 280; Otaheite G. & S. M. & M. Co. v. Dean, 102 Fed. Rep. 929; Robb v. Carnegie Bros., 145 Pa. St. 324, 22 Atl. Rep. 649; Lentz v. Carnegie Bros. & Co., 145 Pa. St. 612, 22 Atl. Rep. 219; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437; Harvey v. Susquehanna Coal Co. (Pa.), 50 Atl. Rep. 770.

[2] Jennison v. Kirk, 98 U. S. 461; Drake v. Lady Ensley C. I. & R. Co., 102 Ala. 501, 24 L. R. A. 64; Logan v. Driscoll, 19 Cal. 623; Esmond v. Chew, 15 Cal. 137; Suffolk G. M. & M. Co. v. San Miguel Cons. M. & M. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Foule v. Mann, 53 Iowa, 43; Sunburg v. Babcock, 61 Iowa, 601; Ehlers v. Stoeckle, 37 Mich. 261; Lebanon School District v. Female Seminary (Pa. St.), 12

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A declaration of this right was lately made by the supreme court of Ohio in a case where the debris from defendant's coal-mine dump was washed down a creek and thence overflowed upon land of plaintiff, covering it with coal slack and debris. The defendant sought to justify by proving that he was conducting his operations in a skilful manner, and his acts were not characterized by malice or negligence. He also sought to set up a custom among coal operators in Hocking valley to deposit slack and refuse, and that the same naturally washed into the channel of Monday creek. In passing upon the rights of the respective parties the court say: "The further claim of the company, that it had the right to make the deposits in the places complained of because it was necessary to the successful conduct of its own business to so place them, seems no less wanting in substance. The effect is to measure the rights of the plaintiff in his lands and in the waters of Monday creek by the convenience or necessity of the company's business. An owner of land in Ohio is not subject to any such narrow and arbitrary rule."[1]

§ 1075. Substantial rights should not be wrongfully invaded.— Respecting just such rights as we have now under consideration, the supreme court of Montana in a late case, while reaching a conclusion perhaps somewhat more harsh

Atl. Rep. 857. See also Cooley, Const. Lim. (6th ed.), pp. 49, 435; Carson v. Hayes (Oreg.), 65 Pac. Rep. 814; Columbus, etc. Iron Co. v. Tucker, 48 Ohio St. 41, 26 N. E. Rep. 630; Lincoln v. Rodgers, 1 Mont. 217; People v. Gold Run Ditch & M. Co., 66 Cal. 138, 4 Pac. Rep. 1152.

[1] Columbus & Hocking C. & I. Co. v. Tucker, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. Rep. 630, citing with approval Tippin v. St. Helena Smelting Co., 4 Best & S. 608, 11 H. L. Cas. 642; Bamford v. Turnley, 3 Best & S. 62; Crawford v. Rambo, 44 Ohio St. 279. See also Lincoln v. Rogers, 1 Mont. 217; Suffolk Gold M. & M. Co. v. San Miguel Cons. M. & M. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Robinson v. Black Diamond Coal Co., 57 Cal. 412; Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166. Compare Crescent M. Co. v. Silver King M. Co., 17 Utah, 444; Stevenson v. Ebervale Coal Co. (Pa.), 50 Atl. Rep. 818.

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than their reasoning seemed to warrant, declared a rule of law upon which all can stand, reasoning somewhat in this manner: Recognizing that every business has its laws, the general application of the maxim, "*sic utere tuo ut alienum non lædas*," and that persons using water cannot avoid fouling in some cases, and diminishing the quantity in others, laid down the rule that, these things being unavoidable, neither fanciful nor insignificant verdicts for damages should be upheld or tolerated. Referring to injunctions in such cases, the court concludes as follows: "Courts are very cautious, and ought to be so, in issuing injunctions in such cases, as more damage may be done by the injunction than could be prevented by its issuance. It is a field of litigation filled with great annoyance and difficulty to both legislatures and courts. It will continue to be such as long as the interests of men conflict."[1]

§ 1076. Tailings and debris statutes, and the general debris question.— The subject of dumping the tailings from placer mines and quartz mills and the debris from coal mines into running streams has been a fruitful source of litigation in many of the states. It may be laid down as a general rule that whoever causes injury to another's land by any of the means above enumerated must respond in damages.[2] In the early decisions in California the right to

[1] Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, partially quoting from and citing with approval People v. Gold Run Ditch & M. Co., 66 Cal. 138, 4 Pac. Rep. 1152; Lindl. Mines, §§ 838–853. See also Otaheite G. & S. M. & M. Co. v. Dean, 102 Fed. Rep. 929.

[2] Otaheite G. & S. M. & M. Co. v. Dean, 102 Fed. Rep. 929; Clifton Iron Co. v. Dye, 87 Ala. 468; Tennessee I. & R. Co. v. Hamilton, 100 Ala. 252; Jones v. Jackson, 9 Cal. 237; Esmond v. Chew, 15 Cal. 137; Gregory v. Harris, 43 Cal. 88; Wixon v. Bear River & Auburn W. & M. Co., 24 Cal. 367; Levaroni v. Miller, 34 Cal. 231; Hill v. Smith, 27 Cal. 475; People v. Gold Run D. & M. Co., 66 Cal. 138; O'Keiffe v. Cunningham, 9 Cal. 589; Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282, 315; Stiles v. Laird, 5 Cal. 120; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; Fuller v. Swan River

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use creeks and rivers as a means of carrying away tailings was distinctly recognized, so long as the lower proprietor received the water in a form that he could use it, there being this qualification upon the application of the general riparian doctrine. This conclusion by the courts was undoubtedly brought about by the necessities of the situation. Other states have not been free from it, and the same sentiment has prevailed to some extent, as we have seen, in Alabama and Pennsylvania; and to a slight extent in Georgia, Montana and Colorado the right has been recognized. The cases noticed in the last note have all recognized this principle to a greater or less extent. But it may be said the later doctrine of many of the cases restricts rather than enlarges the right, and in no case can the use for domestic purposes be destroyed by mining.[1] In some of the states that we have mentioned there seems a hopeless division of opinion — some cases leaning strongly toward the doctrine of an unmodified riparian right.[2] It is sufficient to say, with respect to this latter proposition, that it is dependent largely upon circumstances, and, in reason and principle, ought to yield to the necessities of mining much more readily than the other proposition and right, whereby

Placer M. Co., 12 Colo. 12, 19 Pac. Rep. 836; Satterfield v. Rowan, 83 Ga. 187; Alder Gulch Cons. M. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Wheetley v. Chrisman, 24 Pa. St. 298; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453, overruling s. c., 94 Pa. St. 302, 86 Pa. St. 401.

[1] Crane v. Windsor, 2 Utah, 248. See also Attorney-General v. Steward, 20 N. J. Eq. 415; Wheetley v. Chrisman, *supra;* Hill v. Smith, 27 Cal. 475; Levaroni v. Miller, 34 Cal, 231.

[2] Lincoln v. Rodgers, 1 Mont. 217; Nelson v. O'Neal, id. 284; Fitzpatrick v. Montgomery, 20 Mont. 181: Robinson v. Black Diamond Coal Co., 57 Cal. 412; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442; s. c., 17 Nev. 85; Van Sickle v. Haynes, 7 Nev. 286: Union M. & M. Co. v. Ferris, 2 Sawy. 199; Same v. Dangberg, id. 558; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674; Suffolk G. M. & M. Co. v. San Miguel Cons. M. & M. Co., 9 Colo. App. 407, 48 Pac. Rep. 828, citing Beach v. Sterling Iron & Zinc Co., 54 N. J. Eq. 65, 33 Atl. Rep. 286; McGenness v. Adriatic Mills, 116 Mass. 177. See also Hart v. Liberty Hill Cons. M. & M. Co., 27 Fed. Rep. 768.

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a man's private property is invaded, overflowed or injured by the dumpage of tailings thereon.

§ 1077. Modification of the strict riparian doctrine.— Of course, where streams are used for irrigating or domestic purposes or to furnish any part of the water supply for a city, town or village, the right to have them continue in their pure state is absolute and cannot be interfered with upon any pretext whatever. And in the mining states, where this rule applies by necessity, the pollution of streams by mining debris has generally been recognized as a nuisance and actionable accordingly.[1] Other states have been slow to recognize and admit this, and it has required the interference of both national and state legislation in many cases,[2] and a recognition of the right on the part of the courts to correct the evil; the plea being generally made that mining was a legitimate and necessary industry, and that this was a sort of exercise of eminent domain, and any attempt to regulate it was, *pro tanto*, a strangulation of that industry.[3] In those states, the riparian doctrine, in its original and essential features, has been forced to yield to the necessity of employing the stream to carry away debris, upon the theory that a reasonable use in this manner is more important in a mining community than the application of

[1] Bear River & Auburn W. & M. Co. v. Boles, 24 Cal. 359; Nevada County v. Kidd, 37 Cal. 283; Tenney v. Miners' Ditch Co., 7 Cal. 335; Parke v. Kilhen, 8 Cal. 77.

[2] Nearly all the Pacific coast states have passed statutes attempting to regulate the care and distribution of tailings. These statutes are liable to repeated change, and excepting the federal statute, we will only notice the decisions. Fed. Stat. approved March 1, 1893, 27 Stat. at L. 507; 2 Supp. R. S. U. S., p. 95, copied at length in Appendix "A"; Satterfield v. Rowan, 83 Ga. 187, 9 S. E. Rep. 677; Fuller v. Swan River Placer M. Co., 12 Colo. 12, 19 Pac. Rep. 836.

[3] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453; Tennessee C. I. & R. R. Co. v. Hamilton, 100 Ala. 252, 14 S. Rep. 167; Esmond v. Chew, 15 Cal. 137; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Crescent M. Co. v. Silver King M. Co., 14 Utah, 57; S. C., 17 Utah, 444, 54 Pac. Rep. 244. See also Stevenson v. Ebervale Coal Co. (Pa.), 50 Atl. Rep. 818.

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the strict riparian rule. An example of this modification is thus stated by the supreme court of Alabama: "In these modern times, there has been some slight relaxation of the rules regulating the use of water and of water-courses. Speaking on this subject, we (in a former case[1]) said: 'The general rule is often stated to be that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, or, to state the rule in the words of Shaw, C. J.:[2] Again, each proprietor is entitled to the use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress and improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below.'"[3]

§ 1078. Act creating the California Debris Commission.— This act was passed ostensibly in the interest of navigation, and by its terms embraced that portion of the state of California constituting the San Juaquin and Sacramento watersheds. Its real purpose was to provide a means for controlling the deposit of debris in the rivers and streams of California from hydraulic mining. It had theretofore been correctly settled that hydraulic mining *per se* was not unlawful.[4] In the latter case an injunction was granted, and the necessity of a controlling statute on the subject was conceded by all, and petitioned for by many interested par-

[1] Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 S. Rep. 78.

[2] Cary v. Daniel, 8 Metc. (Mass.) 477.

[3] Tennessee C. I. & R. R. Co. v. Hamilton, 100 Ala. 252, 14 S. Rep. 167.

[4] Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; Woodruff v. North Bloomfield Gravel Co., 16 Fed. Rep. 25, 18 Fed. Rep. 753; United States v. North Bloomfield Gravel M. Co., 58 Fed. Rep. 625.

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ties. In passing upon the matter, Ross, Circuit Judge, gave some of the history leading up to the passage of the law in these words: "The state was admitted into the Union upon the condition, among other conditions, 'that all the navigable waters within said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, duty or impost therefor.' The important question in the case is, What has congress enacted in respect to the navigable waters mentioned in the bill in connection with mining by the hydraulic process? There is but one act upon the subject, and that is the one the construction of which is here involved. To properly construe it, the conditions giving rise to its enactment must be considered. Long continual mining by this process, in the territory drained by the rivers mentioned, had resulted in depositing in them and upon much of the adjacent land vast quantities of debris, thereby, to a great extent, impeding the navigation of the waters and rendering valueless large quantities of otherwise fertile lands. This unfortunate condition of affairs necessarily gave rise to many and bitter contests in the courts between the conflicting interests. . . . Nobody wanted gold mining by the hydraulic process stopped so long as it could be prosecuted without injury to the navigable waters or to the property or rights of others. And so an effort was made by the parties most directly interested — the miners and agriculturalists — to induce congress to legislate upon the subject, which effort resulted in the passage of the act of March 1, 1893. As enacted, after creating the California Debris Commission, . . . it declared, for the purposes of the act, 'hydraulic mining' and 'mining by hydraulic process' to have the meaning and application given to those terms in the state of California. . . . The act prohibited and declared unlawful such hydraulic mining 'directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permit-

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ted under' its provisions. . . . (After quoting several sections of the statute.) From these provisions (and there is nothing in the act to the contrary) it seems quite clear to me that its real intent and meaning is to prohibit and make unlawful any and all hydraulic mining in the territory drained by the Sacramento and San Juaquin river systems in the state of California directly or indirectly injuring the navigability of said river systems, and to permit it in all cases where the work can be prosecuted without such injury to the navigability of said river systems or to the lands adjacent thereto; that, in order to properly determine the facts upon which the legislative will is to act, a skilled commission is created, whose duty it is to ascertain and determine what will or will not cause the prohibited injury, and to prescribe the character of impounding works, and the extent to which hydraulic mining in the territory described may be carried on without causing such injury. To give effect to this manifest purpose, congress, in effect, enacted that until the commission should find that such mining can be carried on without causing the prohibited injury, all hydraulic mining within the territory drained by the Sacramento and San Juaquin river systems is unlawful. . . . It was the right of congress to put a stop to the working of all mines that contribute to any degree to such injury, and to prescribe the conditions upon which such work so contributing might be prosecuted. . . . The provision of section 10 of the act, requiring the surrender to the United States of the right to regulate the manner in which the debris resulting from the working of such mine or mines shall be restrained, and what amount shall be produced therefrom, only constitutes one of the conditions for such use required by congress. As congress already had the power of regulation, it needed no conveyance from the mine owner to vest it. For this reason the insertion of that requirement by congress as a condition to the granting of a permit to mine by the hydraulic process does not render the act

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obnoxious to any of the objections urged against it."[1] The injunction was issued.

Affirming the judgment in the circuit court of appeals, District Judge Hawley, speaking for the court, said: "Under the provisions of the act in question, hydraulic mining in the territory named is prohibited unless the terms and conditions which they impose are complied with. If these provisions are detrimental and injurious instead of beneficial to the mining interests they were intended to foster, encourage and protect, the efforts of all those interested in that particular business should be directed to have the act repealed or amended, instead of attempting to evade it or destroy its efficiency. While it remains as the law upon this subject it must be obeyed."[2] We have quoted thus extensively from these two opinions because it seemed to us that a correct understanding of the situation could not be given in better nor in fewer words. It became absolutely necessary that there be some controlling regulation of this matter and hence the creation of this commission. Of course federal interference was justified because it was a navigable stream which emptied into the ocean that was being injured. The law evolved from this mass of matter is that hydraulic mining whereby the *detritus* is washed into navigable streams is unlawful, while ordinary placer mining does not come under the ban of the law.

§ 1079. The doctrine of this article restated.— The conclusions, then, fairly deducible from the foregoing are:

(1) If a statute is general on the subject of eminent domain over matters of "public use," or if the people have not provided for and defined it in constitution or statute, it is a judicial question.

[1] United States v. North Bloomfield Gravel M. Co., 81 Fed. Rep. 243.

[2] North Bloomfield Gravel M. Co. v. United States, 88 Fed. Rep. 664, 679, citing Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753; Attorney v. Birmingham, 4 Kay & J. 528; Coosaw M. Co. v. South Carolina, 144 U. S. 550.

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(2) In all states where mining is a public use, lands and rights of way may be condemned for dumpage, and for roads, pipe lines, ditches, flumes and tunnels.

(3) A restriction and limitation upon the strict riparian right is recognized in all mining communities.

(4) With the restrictions and limitations above mentioned the right of enjoyment of property in a mining community is absolutely sacred, but as to these limitations they constitute a burden which all are called upon to share.

Article B.

Severance, How Terminated.

§ 1085. How terminated — Merger.
1086. Same — Termination of the estate carved out.
1087. By abandonment.

§ 1085. How terminated — Merger.— Manifestly estates once severed may be again united and the severance terminated, and this is the result when the owner of both estates conveys to an innocent third party by deed with full covenants the fee of the estate without mentioning the previous circumstances or conditions of severance.[1]

§ 1086. Same — Termination of the estate carved out. Of course, where the estate carved out is less than a freehold, as is the case of leases for a term, or of licenses during the will of the licensor, upon the happening of the event provided for in the lease or license, or some act of re-entry authorized by law on the part of the lessor or licensor, the estate so severed ceases, and is again merged into the servient or greater estate, as the case may be.[2]

[1] Snoddy v. Bolen, 122 Mo. 478; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. Rep. 57; Silva v. Rankin, 80 Ga. 79, 4 S. E. Rep. 756.

[2] State v. Coosaw M. Co., 47 Fed. Rep. 225; Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. Rep. 443. See *post*, Mining Leases, Part XIII, ch. II, art. B, ch. IX.

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§ 1087. By abandonment.— Likewise, in either of the cases mentioned in the last preceding section, or where any person owns a dominant estate, to which another estate is servient, the owner of the segregated or dominant estate may abandon and surrender his interest, provided he owes no duty in respect to it, which requires contrary action. And if he does abandon in any of the ways recognized by the law, his estate therein ceases.[1]

[1] Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. Rep. 839; Jennings v. Elk Fork Oil & Gas Co., id.; Foster v. Elk Fork Oil & Gas Co., id.; Bloomfield Coal M. Co. v. Tidrick, 99 Iowa, 88, 68 N. W. Rep. 570; Hawkins v. Pepper, 117 N. C. 407, 23 S. E. Rep. 434; Stage v. Boyer, 188 Pa. St. 560, 88 Atl. Rep. 1085.

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PART XIII.

OF MISCELLANEOUS TITLES, CONVEYANCES AND CONTRACTS, AND HEREIN OF EXECUTORY CONTRACTS.

CHAPTER I.

OF MINING DEEDS GENERALLY.

ARTICLE A.

Essentials, Including Execution and Description.

§ 1090. Purposes of this part — Scope of treatment.
1091. Mining deed generally — The common law — Severance — Articles of incorporation as deed.
1092. Mining deeds in a general sense — Distinction between opened and unopened mines abolished.
1093. Distinction between mining and other deeds.
1094. General observations — Essentials of a valid conveyance.
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1100. What conveyed — Sometimes surface, sometimes ores.
1101. Same subject — General covenants — What conveyed — Interest in land — Mining right — Severed estate.
1102. Same subject — What included — Dump room for a tunnel.

§ 1090. Purposes of this part — Scope of treatment.— It is our purpose to examine in a general way the special provisions and decisions of the courts relative to conveyances, leases of mines, licenses, miscellaneous contracts, coal, gas and oil contracts, prospecting contracts, tenancy in com-

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mon and mining partnerships. Except as to the latter, we shall not enter into any general discussion of the law in either branch, as that is more properly the subject for a special work on those subjects. We will content ourselves within the narrowest possible limits with examining those principles and decisions which apply exclusively to some branch of the mining law. No general discussion of the law of conveyances will be made here. Mining deeds and contracts, however, are often controlled by special rules. An examination of a few principles controlling conveyances of mining claims is therefore necessary.[1]

§ 1091. Mining deed generally — The common law — Severance — Articles of incorporation as deed. — In all grants of mining claims and mining rights, as used in England and in many parts of this country, where the mining right is severed from the surface, the right is generally conveyed in terms which are uniform as to their effect and operation. Mining rights so conveyed are generally described substantially as a right to enter certain designated premises and search for minerals; to mine or work them, prepare and sell them. And, as a general rule, a deed purporting to convey such rights will be held to convey a severed interest in the land, and not a mere mining right.[2] In a Utah case it was held that articles of incorporation describing the mining claims which the corporation took in payment of its capital stock constituted a sufficient conveyance to satisfy the statute of frauds, and when accompanied by possession at least passed the title by operation of law.[3]

§ 1092. Mining deeds in a general sense — Distinction between opened and unopened mines abolished. — What we have already had to say with reference to the severance

[1] Adams v. Ore Knob Copper Co., 7 Fed. Rep. 634; Keyes v. Powell, 2 El. & Bl. 132, 22 L. J. Q. B. 305; Caldwell v. Fulton, 31 Pa. St. 475.

[2] Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. Rep. 812; Whittaker v. Brown, 46 Pa. St. 197; French v. Seely, 6 Watts, 292; Thompson v. Mattern, 115 Pa. St. 501, 9 Atl. Rep. 70.

[3] Murray Hill M. & M. Co. v. Havenor (Utah), 66 Pac. Rep. 762.

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of the mineral estate from any other estate demonstrates the capability of each mineral stratum as being the subject of conveyance. We have here to do not only with that particular question in the abstract, but likewise with mines when considered as an entire *corpus* of property; and with reference to the western part of the country, and wherever mining is carried on *en masse*, the entire mining claim. Formerly a distinction was made between the transfer of opened and unopened mines, but it may now be said to be more imaginary than real.[1] Said Mr. Bainbridge, speaking of mines: "They are capable of delivery, and being made the subject of ejectment, 'by the name mineral,' says Coke, 'or *fodina plumbi*, etc., the land itself shall pass in the grant, if delivery be made, and also be recovered in assize.' It has been stated that if a grant of mines be made without delivery the grantee will only take a power to dig and work them. But now, by a late statute, all corporeal hereditaments are declared, as regards the conveyance of the immediate freehold, to lie in grant as well as in livery."[2]

§ 1093. Distinction between mining and other deeds.— There has always been this distinction in practice between mining deeds and other real-estate deeds: In addition to the usual clauses required in the real-estate deed, it has been customary, and by many lawyers and courts thought necessary, to insert in the *habendum* clause a provision somewhat in these words: "Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant,

[1] Bainb. Mines (1st Am. ed.), pp. 130, 147; Lewis v. Branthwaite, 2 Barn. & Ad. 437; Stoughton v. Lea, 1 Taunt. 410; Findlay v. Smith, 1 Munf. (Va.) 134; Crouch v. Puryear, 1 Rand. (Va.) 258.

[2] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 130; Co. Litt. 6 A; Shep. Touch. 96; Comyn v. Kyneto, Cro. Jac. 150; Barnes v. Mawson, 1 M. & S. 77; Wilkinson v. Proud, 11 M. & W. 33, 12 L. J. (N. S.) Ex. 227; 8 & 9 Vict., ch. 106. See also Whittaker v. Brown, 46 Pa. St. 197; French v. Brewer, 3 Wall. Jr. 346, 9 Fed. Cas. 774.

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and therewith usually had and enjoyed,"[1] — following with a general description of the tenements, hereditaments, etc. But it is believed that even in a common-law deed, and in case the statutory form may be thought inadequate, and out of abundance of caution, the insertion of the words "together with all the mining rights, privileges and franchises thereunto incident or therewith usually had and enjoyed," would be sufficient to convey the statutory right of following all the veins in their downward course beyond the side lines of the claim, which is the only difference, in the matter now under consideration, between mining ground and any other real estate.

Mr. Morrison gives the following sentence, which is usually inserted in the Colorado deeds, as well as the deeds used in many other mining states: "Together with all and singular the lodes and veins within the lines of said claim, and the dips, spurs, mines, minerals, easements, mining fixtures, improvements, rights, privileges and appurtenances thereunto in any wise belonging."[2]

It has been held, and manifestly correctly too, that a quit-claim deed is effectual to pass all the estate of the grantor;[3] and a purchaser without notice of an outstanding equity is not affected.[4] Likewise articles of incorporation have been held to convey the property described.[5]

§ 1094. General observations — Essentials of a valid conveyance. — From what we have outlined in the preceding sections of this chapter, it must be quite apparent that anything but the most cursory examination of the essentials of a mining deed would be quite out of place in a work of this kind. It suffices to say, and the rule stated broadly is,

[1] Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. Rep. 430, 433.

[2] Morr. Min. Rights (8th ed.), p. 198.

[3] Brophy M. Co. v. Brophy & Dale M. Co., 15 Nev. 101.

[4] Bradbury v. Davis, 5 Colo. 265. Compare Baker v. Clark (Cal.), 60 Pac. Rep. 677, where it was held, owing to its peculiar terms and conditions, to be a license.

[5] Murray Hill M. & M. Co. v. Havenor (Utah), 66 Pac. Rep. 762.

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that the same principles of law which govern and control other real property generally, are alike applicable to mining property.[1] The transferable character of mines and mining claims upon the public domain of the United States has always been recognized by the courts, and the title and possession of the grantee enforced.[2] The reason of this is obvious, if reason were necessary, because the transferable character of mining claims has always been recognized. This being true, it follows that the transferable character of a severed estate, consisting of a seam or stratum, such as constituted a mine under the old law, makes the same rule applicable to it.

§ 1095. Some decisions as to sufficiency of deeds.— It has been held that a deed of a mine deals with the cube, that a horizontal cube may be made a dividing line, and unopened beds may be granted the same as the surface.[3] A deed which read, "this deed witnesseth that I have this day sold, and by these presents do convey . . . one-sixteenth part of my half of all mineral contained in a certain tract of land, . . ." was held by its terms a conveyance of an estate in minerals and mines, and the word "sold" *ex vi termini* imports a valuable consideration.[4]

[1] Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. Rep. 430.

[2] Forbes v. Gracey, 94 U. S. 762; Harris v. Equator M. Co., 8 Fed. Rep. 866; McCarron v. O'Connell, 7 Cal. 152; Draper v. Douglass, 23 Cal. 327; Clark v. McElvy, 11 Cal. 154; Melton v. Lambard, 51 Cal. 258; Sullivan v. Hense, 2 Colo. 424; Poire v. Wells, 6 Colo. 406; Sussenback v. First National Bank, 5 Dak. 477, 11 N. W. Rep. 662; Idaho G. M. Co. v. Union M. & M. Co., 47 Pac. Rep. 95; Montana M. Co. v. St. Louis M. & M. Co., 20 Mont. 394, 51 Pac. Rep. 824; Barkley v. Tieleke, 2 Mont. 59; Forrester v. Boston & Montana G. & S. M. Co., 21 Mont. 544, 55 Pac. Rep. 229; Hopkins v. Noyes, 4 Mont. 556, 2 Pac. Rep. 280; Phillpotts v. Blasdel, 8 Nev. 61; Weill v. Lucerne M. Co., 11 Nev. 201; Zeckendorf v. Hutchinson, 1 N. Mex. 476; Richards v. Schlegelnich, 65 N. C. 151; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. Rep. 690; Hayden v. Brown, 33 Oreg. 221, 53 Pac. Rep. 490; Webber v. Vogle, 189 Pa. St. 156, 42 Atl. Rep. 4; Wasatch M. Co. v. Crescent M. Co., 7 Utah, 6.

[3] Massott v. Moses, 3 S. C. 168, 16 Am. Rep. 697, 8 M. R. 607.

[4] Reaves v. Ore Knob Copper Co., 74 N. C. 593, 3 M. R. 369.

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Minerals are a corporeal hereditament, and pass by apt words in a deed, but can only be so passed before severance.[1] But an instrument in writing not intended to grant the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of land.[2]

§ 1096. Conveyances to and by corporations — Deed to corporation not formed, effect.— The right to buy and sell is inherent in a corporation, and its conveyance under seal, executed by the proper officers, is *prima facie* evidence of a proper and authorized conveyance.[3] A corporation may take by deed and the deed will pass title, although made while the corporation is still incomplete as to its organization and before its officers have been elected.[4] There have been some decisions contrary to this, but we apprehend this to be the true rule, the theory of the other decisions being that the corporation, not being capable of taking until completely formed, was a being not *in esse;* but we must remember that the presumption will be against the date in such a case and not against the corporate existence and the doctrine of relation applies in aid of the title. Perhaps, however, the better practice would be to deed to a trustee pending the formation of the corporation. Still, where a deed is made to a mining company by name, it shows on its face a grantee capable of taking.[5] But in Pennsylvania, where B. contracted for the purchase of a piece of oil land and sold an interest or share in the adventure to plaintiff, and afterwards he had a deed executed to the Middleton Oil Company, no such company having been formed, it was held that the deed passed no title, for the want of a proper grantee.[6] It may be said, however, that it does not appear in that case that any such corporation as

[1] Caldwell v. Fulton, 31 Pa. St. 475. See also Hartwell v. Camman, 10 N. J. Eq. 128.

[2] McBee v. Loftus, 1 Strob. Eq. 90, 3 M. R. 222.

[3] Myers Co. v. Zollerback, 37 Cal. 544; Evans v. Lee, 11 Nev. 194.

[4] Fremont M. Co. v. Windom Co. Bank, 44 Vt. 489, 3 M. R. 312; Spring Garden Bank v. Lumber Co., 32 W. Va. 357; Wharf Co. v. Judd, 108 Mass. 224; Clifton Land Co. v. Randell, 82 Iowa, 89.

[5] Cochran v. O'Keefe, 34 Cal. 354.

[6] Burns v. McCabe, 72 Pa. St. 309, 7 M. R. 1.

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the one named was organized, but rather that it was a mythical name of a partnership. In such case, of course, there was no one to take, nor any one afterwards to receive title, in which case the rule above stated was undoubtedly correct.

A deed by a corporation, whereby it seeks to convey away real estate, must, under the laws of some of the states, be ratified by two-thirds of the stockholders of the corporation.[1] In the absence of statute, however, we take it to be sufficient if it be ratified by a majority of the stockholders; but, of course, common prudence would dictate that the majority be made as large as possible.

§ 1097. As to description only — Some special circumstances.— It is usually sufficient to describe the interest conveyed by a mining deed as a certain undivided interest in the claim by its recorded name, without reciting its description as to metes and bounds. Indeed, it has been considered that a description by metes and bounds is not only unnecessary but bad conveyancing.[2] The recorded name of a claim or location has been held by the supreme court of the United States to be sufficient.[3] So, where a lode has two names, and the deed conveyed all the grantor's right to a certain lode, more particularly known as the "L" company's claim, it was held to include all the grantor's interest, notwithstanding the fact that he derived title under two different and separate locations.[4] From which it follows that it is unsafe to use the name of a group or of a mine in a conveyance without specifying the exact interest conveyed, unless it is intended to convey all the grantor's interest in each of the locations making up such group or mine.[5] And a deed referring to a location certificate for a description of the lode conveyed is a conveyance by the

[1] Pekin M. & M. Co. v. Kennedy, 81 Cal. 356, 22 Pac. Rep. 679; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178.

[2] Morr. Min. Rights (8th ed.), 194.

[3] Glacier Mt. M. Co. v. Willis, 127 U. S. 471, 32 L. ed. 172; Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72.

[4] Weill v. Lucerne M. Co., 11 Nev. 200; Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. Rep. 98.

[5] Smith v. Sherman M. Co., *supra*.

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metes and bounds contained in the location certificate.[1] And where a deed described the property by metes and bounds, and then as mineral entries numbers 87 and 88, lots 40 and 41, and patented as Walker and Walker Extension and Buckeye mining claims, mineral entries numbers 87 and 88, lots 40 and 41, the description by metes and bounds including the ground in controversy, which was not covered by the patent, and which was omitted from the remainder of the description, it was held that the instrument covered the entire claims, including the ground in controversy.[2] Thus, in this respect, it will be seen that the general intent governs, and the instrument will be restricted to the intention of the parties where this can be ascertained.[3]

The Utah decision turned upon the ground that one description included the land in controversy, while the other did not; and the other being contradictory in itself was rejected for the reason that where a grant contains two descriptions of the same property, and one is complete, definite and intelligible, and the other is undefined, contradictory and uncertain, in construing the grant the former will control.[4] But the general rule is that a special intent and a special description will control a general intent or a general description.[5]

§ 1098. Corporation deed — Special case — A two-thirds majority held insufficient.— In Montana there is a statute providing that the trustees or officers of a corporation should not have power to sell all its property except by consent of two-thirds of its stockholders.[6] In a recent case coming before the supreme court of that state, following the com-

[1] Harris v. Equator M. & S. Co., 3 McCrary, 18, 8 Fed. Rep. 863; McCurdy v. Alpha G. & S. M. Co., 3 Nev. 24; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361.

[2] Crescent M. Co. v. Wasatch M. Co., 5 Utah, 624, 19 Pac. Rep. 198.

[3] Glass v. Wilbur, 102 Mass. 24; Jones v. Clifford, 8 C. & D. 779.

[4] 2 Devlin on Deeds, 1038, 1041; Driscoll v. Green, 59 N. H. 101.

[5] Ross v. Heathcock, 52 Wis. 557, 9 N. W. Rep. 609, 8 M. R. 404.

[6] Compiled Stat. of Montana, 1897, §§ 492, 493, 494.

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mon-law rule, it was held that, since at common law neither the directors nor a majority of the stockholders could transfer all the property of a corporation, where the same was a prosperous and going concern, able to achieve the objects of its creation against the dissent of a single stockholder, the Montana statute, permitting a sale of the corporate property by consent of two-thirds of the stockholders, does not enlarge the common-law rule in the case of a corporation such as above described.[1] And plaintiff, a single stockholder, was permitted to maintain injunction to prevent such disposition.[2]

In a recent Colorado case, one of the directors, having no power as such to make a sale of the corporate property, negotiated a sale of it. This sale was never formally ratified by the board of directors, though the president, who had power to sell the corporate property, joined in a petition to the court for confirmation of the sale, the property having gone into the hands of an assignee; and the court held the sale invalid.[3] These are extreme cases, and it may be laid down as a general rule that where the articles themselves authorize a sale by consent of a certain majority of the capital stock of the corporation, or the statute authorizes the same thing, a sale so made is valid and binding, because the authority to do the act is vested in the officers and stockholders by the act of creation, and courts will not generally interfere to take the business of a corporation out of the hands of those authorized to exercise it.[4]

[1] Forrester v. Boston & Montana R. & S. M. Co., 21 Mont. 544, 55 Pac. Rep. 229, citing Abbott v. Rubber Co., 33 Barb. (N. Y.) 578; People v. Ballard, 134 N. Y. 269, 32 N. E. Rep. 54; 7 Am. & Eng. Ency. of Law (2d ed.), pp. 734, 736; Gans v. Switzer, 9 Mont. 408, 24 Pac. Rep. 18; 9 Am. & Eng. Ency. of Law (2d ed.), p. 565.

[2] Forrester v. Mining Co., *supra;* citing Geary v. Bank, 19 Mont. 199, 47 Pac. Rep. 813; Ashton v. Association, 84 Cal. 61, 23 Pac. Rep. 660, 23 id. 1091; Botts v. Road Co., 88 Ky. 54, 10 S. W. Rep. 134; Smith v. Dorn, 96 Cal. 73, 30 Pac. Rep. 1024; Barr v. Plate Glass Co., 40 Fed. Rep. 412.

[3] Extension G. M. & M. Co. v. Skinner (Colo.), 64 Pac. Rep. 198.

[4] 1 Thomp. Corp., § 9; 4 id. 4446; 7 id. 8363, 8364; 5 id. 6133, 6134, 6136.

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§ 1099. Deed in general — Common-law observations — Other descriptions — Deeds of severance.— In all grants of mining claims and mining rights, from the earliest reported cases down to the present time, there is a striking similarity in the terms used to describe the character of the rights intended to be conferred. It is described substantially as a right to enter certain designated premises and search for minerals, to mine and work them, prepare and sell them. In some cases the premises may be used for manufacturing only to the extent of preparing the raw material for use or sale; in others the right to use premises for the purpose of manufacture is unlimited as to the nature and extent of the manufacturing powers. The right uniformly embraces the authority to go upon the land of another and perform there certain acts which could only be justified under authority derived from the owner, of severing from the land certain portions of the body of the land, so as to make it personal property, and preparing the same as against the right of another and all persons.[1] In Pennsylvania it was recently held that where a deed conveyed to M. a tract of land described by metes and bounds, and calling for other lands of P. P. Price (defendant) as adjoiner on the east, together with the right of mining and removing all the mineral that may be reached under said Price's land from the land above described and hereby conveyed, with a description of the mineral conveyed, was sufficiently certain, it being equivalent to saying that it was the mineral in the land of defendant adjoining the land conveyed by him to M. on the east.[2]

§ 1100. What conveyed — Sometimes surface, sometimes ores.— As we have seen, sometimes a conveyance conveys a mining right merely, and sometimes the ores or coals with right of occupation pending their removal. The courts have not been certain as to what name they would give such instruments, sometimes characterizing them as leases,

[1] Massott v. Moses, 3 S. C. 168. [2] Peart v. Brice, 152 Pa. St. 177.

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and at other times as deeds of an interest in the land, and in still other cases as a sale of the product. Thus a conveyance of a tract of land, with the full right, title and privilege of digging and taking away stone and coal to any extent the grantee might think proper, from under an adjoining tract owned by the grantor, is not a license, but a conveyance of the entire ownership of the coal in place beneath the adjoining tract.[1] An instrument conveying the right to dig for coal was construed as a deed sufficient to carry the exclusive property in the coal to the grantee.[2] And an instrument of one undivided half part of certain premises upon which any valuable mineral substances may be found which the said grantee may deem proper to open, and may be on said undivided half of said land, is an agreement for one-half of the minerals with the right to operate, rather than a conveyance of an absolute fee in one-half of the premises.[3] But where in a deed of certain lands the grantee reserved the entire privilege of all ore on said premises with permission to enter thereon to mine, clean and take away the same, without let or hindrance from the grantees, it was held by the supreme court of Pennsylvania that this amounted to an exception, and that, as a consequence, the fee in the reserved mineral remained in the vendor.[4]

A mining right upon a specific piece of ground is a right to enter and occupy the ground for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication, the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment.[5]

[1] Caldwell v. Fulton, 81 Pa. St. 475, 3 M. R. 288; Irwin v. United States, 16 How. 522; Johnstown Iron Co. v. Cambria Iron Co., 82 Pa. St. 241; Gloninger v. Franklin Coal Co., 55 Pa. St. 9.

[2] Lee v. Katz, 4 W. Va. 543.

[3] Rowell v. Bodfish (Me.), 10 Atl. Rep. 448.

[4] Thompson v. Mattern, 115 Pa. St. 501, 9 Atl. Rep. 70.

[5] Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880; Clark v. Duval, 15 Cal. 85; Cave v. Crafts, 53 Cal. 135.

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The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the privileges which may be derived from its rents, or from quarrying and digging for its ores. And a deed conveying mining rights will be held to carry with it all these rights, the same as if expressed in full and complete terms.[1]

The New York court of appeals recently decided that a grant of "mineral ores" did not include granite; also that the words "minerals and ores," in a deed, cannot be restricted to the same meaning as "mineral ores."[2] This was a case where two deeds had passed between the parties, the first one conveying all "mineral ores," and the second, without referring to the first, but reciting the same consideration and describing the same premises, conveying all the "minerals and ores." The court held that the words in the last deed were sufficient to convey granite deposits, if the means of obtaining them without injury to the surface was also granted; but that, inasmuch as the grant of mining privileges contained no provision for obtaining the granite deposits, the terms of the grant were limited to underground workings. In the course of the opinion, Andrews, C. J., speaking for the court, said: "We have been referred to several English cases where the right of open quarrying has been held to accompany a grant or reservation of mines or minerals. The cases generally have arisen on the construction of reservations contained in acts of parliament, or rights of land-owners whose lands are compulsorily taken for public purposes or by public authority. In every case which has come to our attention involving the right of open quarrying, it has been sustained upon some special language in the act which indicated that the right of open quarrying was intended to be reserved."[3]

[1] Smith v. Cooley, 66 Cal. 46, 2 Pac. Rep. 880.

[2] Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. Rep. 186. But see Brady v. Brady, 65 N. Y. S. 621. See also *post*, § 1114; Kincaid v. McGowan, 88 Ky. 91, 4 S. W. Rep. 802.

[3] Armstrong v. Lake Champlain Granite Co., *supra*.

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§ 1101. Same subject — General covenants — What conveyed — Interest in land — Mining right — Severed estate. — It has elsewhere appeared at length in this work that a conveyance sometimes, and especially in the case of severance, conveys a mining right merely. Sometimes it conveys the ores or coals with right of occupation pending their removal.[1] The courts have not been certain in all cases as to what name they would give to such instruments; sometimes characterizing them, as we have seen, as leases,[2] and again as interests in land,[3] and in still other cases as a sale of the product.[4] The better and general rule seems to be that they should be characterized as a severance of the estate, unless they contain words expressly restricting the grant to a lesser purpose, and they should be held to convey an interest in the land co-extensive with the words and description employed.[5]

§ 1102. Same subject — What included — Dump room for a tunnel. — As we have elsewhere seen, the general practice has been to carve out by deed, lease or license, thus

[1] See *ante*, § 1100. See also Part XII, ch. IV; Jennings Bros. & Co. v. Beale, 158 Pa. St. 283, 27 Atl. Rep. 748; Algonquin Coal Co. v. Northern C. & I. Co., 162 Pa. St. 114, 29 Atl. Rep. 748; Moore v. Brown, 139 N. Y. 127, 34 N. E. Rep. 772; Genet v. Delaware & H. Canal Co., 122 N. Y. 527, 25 N. E. Rep. 992.

[2] See last preceding section. See also *post*, this Part, ch. II.

[3] Hope's Appeal (Pa.), 8 Atl. Rep. 23, 2 Cent. Rep. 43; Rankin's Appeal, 1 Monaghan (Pa.), 308; Wardell v. Watson, 93 Mo. 107; Williams v. Hay, 120 Pa. St. 485, 14 Atl. Rep. 379; Lee v. Baumgardner, 86 Va. 315, 10 S. E. Rep. 3; Thompson v. Mattern, 115 Pa. St. 501, 9 Atl. Rep. 70.

[4] Cons. Coal Co. v. Schmisseur, 135 Ill. 371, 25 N. E. Rep. 795; Rowell v. Bodfish (Me.), 10 Atl. Rep. 448; Re Lazarus Estate, 145 Pa. St. 1; Stewart v. Northwestern C. & I. Co., 147 Pa. St. 612.

[5] Henderson v. Verden, 78 Ill. App. 537; Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. Rep. 144; Wardell v. Watson, 93 Mo. 107; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. Rep. 690; Williams v. Hay, *supra;* Mansfield Coal & Coke Co. v. Royal Gas Co., 27 Pittsb. L. J. (N. S.) 70; Delaware & H. Canal Co. v. Hughes, 2 Lacka. Leg. News, 21; Pearne v. Coal Creek M. & Mfg. Co., 90 Tenn. 619, 18 S. W. Rep. 402; Murray v. Allard, 100 Tenn. 100, 43 S. W. Rep. 355; Virginia C. & I. Co. v. Kelley, 93 Va. 332, 24 S. E. Rep. 1020.

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accomplishing a severance, two or more estates from the same block of earth, and what is not included in one belongs to the other, whether the severance be by deed or by reservation; and the possession of surface land is in no way adverse to the right of possession to the coal beneath the surface, by another, under an agreement for the sale of such coal. In short, the possession of one is not adverse to the other under circumstances of subordination, but is in all other cases;[1] and parol evidence is not admissible to show that more and different minerals were intended than those expressed, or the contrary.[2]

But a right of way for a tunnel through certain mining ground with the appurtenances has been held sufficient to convey a right for dumping at the mouth.[3]

Article B.

Of Special Covenants.

§ 1108. The effect of special covenants.
1109. Effect of reservations.
1110. A few of the leading cases — When reservations and when not.
1111. Who bound by covenants — Parties and privies.
1112. Consideration as means of interpretation — Sufficiency of.
1113. Special covenants — Reference to other instruments.
1114. Appurtenances, incidents and fixtures also pass.
1115. Restricted to intent.

§ 1108. The effect of special covenants.— Of course, in the interpretation of a deed where any ambiguity arises, the surrounding circumstances afford a valuable means of arriving at a just conclusion. Likewise, special covenants will also tend to throw light on a general transaction, and, so far as they serve as a guide for the interpretation or construction of the deed, and show the intent of the parties, they are generally not only valuable but absolutely controlling.[4]

[1] Lulay v. Barnes, 172 Pa. St. 331; Hartwell v. Camman, 10 N. J. Eq. 128, 3 M. R. 229.

[2] Hartwell v. Camman, *supra*.

[3] Scheel v. Alhambra M. Co., 79 Fed. Rep. 821.

[4] Ross v. Heathcock, 52 Wis. 557, 9 N. W. Rep. 609. See also Dexter

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§ 1109. Effect of reservations.— What we have elsewhere said on the subject of reservations leaves little to be said now. It is not an uncommon thing in lode mining, as well as in coal and iron mining, to reserve something out of the grant to the use of the grantor and his assigns, operating sometimes as a severance of the estates, and in other cases creating an easement, to which the granted estate becomes servient. This, as we have seen, is entirely competent for a grantor to do so long as the reservation is not as large as the grant itself. When this is the case the reservation is generally but not always void. The courts have had under discussion many cases bearing upon these observations and we will cite —

§ 1110. A few of the leading cases — When reservations and when not.— Thus, where the owners of land conveyed a part of it to plaintiff, with a reservation to them and their assigns of the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances, and the right to do whatever was necessary to obtain and transport such minerals, including the erection of proper machinery and the laying of pipes, it was held that the defendants had no right to plaintiff's land further than was necessary to the exercise of the rights reserved in that tract alone, where similar grants were made to others, the plain intent being that they had the right to the possession of such land.[1]

A deed of bargain and sale, with words of inheritance, granted certain lots, all gas from certain wells, and the perpetual right to mine and carry away coal, there being, however, no condition nor covenant requiring him to mine, and the court decided that an exclusive right to mine and carry away coal was not granted.[2] So, a conveyance of a full fee-simple, reserving to the grantor, his heirs and assigns, a free toleration of getting coal for their own use, does not reserve

Co. v. Dexter Co., 6 R. I. 351; Yahoola River, etc. M. Co. v. Irby, 40 Ga. 479.

[1] Dietz v. Mission Transfer Co., 25 Pac. Rep. 423. See s. c. on rehearing, 95 Cal. 92, 30 Pac. Rep. 380.

[2] Jennings v. Beele, 158 Pa. St. 283, 27 Atl. Rep. 948.

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all the coal beneath the surface, but simply an incorporeal hereditament, or right, concurrent with the mining right of the grantee, to get and carry away such coal as the grantor and his assigns may personally need for fuel.[1] And where a grant of mineral rights in land is defeated by the grantee's failure to perform the particular acts stipulated to be done by him, in the instrument itself, and which form the real consideration therefor, the rights of the grantee become forfeited, and no re-entry is necessary by the grantor.[2]

§ 1111. Who bound by covenants — Parties and privies. It must be apparent that mining deeds are liable to the same general rules of construction as ordinary deeds. This applies especially to the covenants of the deed, which bind, not only the immediate parties, but also their privies, including all persons participating, in any manner, in any of the rights granted or reserved.[3] But while the parties and privies are thus bound, the recitals in a deed are no evidence against strangers.[4] In this last case the court had under consideration a deed which recited that the grantors were the heirs at law of the former owner, and the court held that only parties in the deed and persons claiming under it were bound by this recital.[5]

§ 1112. Consideration as means of interpretation — Sufficiency of. — The consideration sometimes plays an important part in the construction of a deed and in determining the nature of the grant. For instance, where the consideration in a deed is an entire sum of money, demandable absolutely under the deed, and which may be assumed to include a valuation fixed by the parties, in consideration of

[1] Algonquin Coal Co. v. Northern Coal & Iron Co., 162 Pa. St. 114, 29 Atl. Rep. 402.

[2] Hawkins v. Pepper, 117 N. C. 407, 23 S. E. Rep. 434.

[3] Vermont M. Co. v. Windom County Bank, 44 Vt. 489, 3 M. R. 312; Hartford & Salisbury Ore Co. v. Miller, 41 Conn. 112, 3 M. R. 353; Belcher Cons. M. Co. v. Deferrari, 62 Cal. 160; Oregon Co. v. Trulenger, 3 Oreg. 1.

[4] Yahoola, etc. Co. v. Irby, 40 Ga. 479, 14 M. R. 460. See Rust v. Carpenter, 18 Colo. 340.

[5] Citing, which see, Carver v. Jackson, 4 Peters, 1, 83; 1 Greenleaf, Ev., § 23.

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which the grantee was authorized to remove from the premises all ore that might possibly be removed therefrom during the term of ten years, and by the further fact that the deed by its terms professed to sell and convey the mineral itself, as well as the right to search for and take it, it will be an absolute grant of the mineral.[1] It is generally advisable to insert the actual consideration in all deeds, on account of the bearing of the consideration upon the intent of the parties, if there is otherwise any uncertainty. Independent of this question, however, in the absence of fraud or concealment, any valuable consideration will support the deed.[2] This is elementary and settled beyond dispute.

§ 1113. Special covenants — Reference to other instruments.— Special covenants also tend to throw light on the general transaction, and so far as they serve as a guide for the interpretation of the instrument or a construction as to the intent of the parties, they are valuable. And where another deed is referred to as qualifying the one under consideration, either in matter of description or as covenants for title, it will be taken as a part of the transaction, and the two will be construed together.[3]

In an early New York case plaintiff conveyed to defendants all that certain mining lode or claim known as the John mine, and the conveyance referred to the deed by which the plaintiff acquired title, which conveyed all the dips, spurs and angles and metals, ores, gold and silver bearing quartz and earth, and all privileges and franchises thereto incident, etc. It appeared that plaintiff had theretofore executed a deed to another person of all that portion of the surface ground of the John mine lying and being south of the John mine, which meant the opening, commencing at the center of the vein and running its entire

[1] Massott v. Moses, 3 S. C. 168; Lord Mountjoy's Case, Godb. 17; 2 Co. Litt. 165; Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. Rep. 443.

[2] Neill v. Shamburg, 158 Pa. St. 268; Tuck v. Downing, 76 Ill. 71. See Maloy v. Berkin, 11 Mont. 188, 27 Pac. Rep. 442.

[3] Wallace v. Silsby, 42 N. J. L. 1, 3 M. R. 390.

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length, which deed contained the following words: "This deed is intended to convey the south 100 feet of the John mine," etc. It was held that this latter deed conveyed only the surface ground and did not include any of the mineral rights, and, therefore, constituted no defense to an action for the price of the mining claim, all the minerals having passed by defendant's deed.[1] And where one deed conveyed one-half of the coal and minerals in a certain piece of land, except the minerals of all the precious kinds, and by another deed the same owner assumed to convey all the minerals, it was held that the latter deed created a cloud upon the title held under the former.[2]

§ 1114. Appurtenances, incidents and fixtures also pass.— We have seen that where a deed conveys a piece of mining ground, or an interest or separate estate in it, all the means necessary for its enjoyment are likewise conveyed. Not to repeat at too great length, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted. The term "mines and minerals," and all the privileges thereof, conveys the right to the minerals and the right to dig for them.[3] And where coal upon severance has become the property of the lessee, he has the right to enter and remove it, and to use the tramways or other modes of conveyance of the lessor on the premises for such purpose. It belongs to him and he has the right to take it.[4]

§ 1115. Restricted to intent.— It is a general rule that a deed will be restricted or enlarged to conform to the in-

[1] McIntyre v. Buell, 10 N. Y. Sup. 332.

[2] Pearne v. Coal Creek M. Co., 90 Tenn. 619, 18 S. W. Rep, 402. See also McCurdy v. Alpha M. Co., 3 Nev. 27; Stewart v. Northwestern Coal & I. Co., 147 Pa. St. 523, 23 Atl. Rep. 882; Brophy M. Co. v. Brophy & Dale Co., 15 Nev. 101.

[3] Griffin v. Fellows, 81 Pa. St. 114, 8 M. R. 657; Rowell v. Bodfish (Me.), 10 Atl. Rep. 48; Bushnell v. Proprietors, etc., 81 Conn. 150, 3 M. R. 258; Caldwell v. Fulton, 81 Pa. St. 475. But see *ante*, § 1100, notes 2 and 3, p. 913.

[4] Lykens Valley Coal Co. v. Dock, 62 Pa. St. 232, 8 M. R. 570; Genet v. Delaware & H. Canal Co., 122 N. Y. 527, 23 N. E. Rep. 922; Munn v. Stone, 58 Mass. 146.

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tent of the parties, as gathered from the instrument itself and surrounding circumstances, properly aided by parol testimony within the lines limited by the general rules of evidence, to explain it. And where the court is able, from any or all of these circumstances, to define and determine what was the real intent of the parties at the time, the deed must be construed in the light of such intent.[1]

The true rule is always to give effect to the intention of the parties if the words they have employed will admit of it. But if the words used, by their clearness and certainty, absolutely forbid the aid of extrinsic evidence in their interpretation, it would be changing a certain written contract of the parties to let in outside parol proof.[2] The doing dominates the intent wherever there is an apparent conflict, on the implied principle that the intent is interpreted by the act.[3]

Article C.

Of Statutory Deeds.

§ 1119. Short statutory deeds obviating covenants.
1120. Contrary rule — A peculiar case.
1121. Curative statutes.

§ 1119. Short statutory deeds obviating covenants.— Wherever the statute of the state has established a form of conveyance, it is believed that the mining law is equally ingrafted into that as is the other or general law of real property; and that the statutory conveyance, whereby covenants are considered as expressed, although not contained in the deed, the entirety of the estate conveyed being also omitted, nevertheless, all the estate held by the grantor, with all

[1] Wilcox v. Lucas, 121 Mass. 21, 3 M. R. 380; Glass v. Hulbert, 102 Mass. 24; Jones v. Clifford, 3 Ch. Div. 779; Wasatch M. Co. v. Crescent M. Co., 5 Utah, 624, 19 Pac. Rep. 198.

[2] Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. Rep. 186, 187; Taylor v. Holter, 1 Mont. 688, 3 M. R. 322; Tymason v. Bates, 14 Wend. 672; Chester Emery Co. v. Lucas, 112 Mass. 424.

[3] Vanatta v. Brewer, 32 N. J. Eq. 268, 6 M. R. 358.

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rights and franchises, will be held to pass by the deed the same as if specific covenants therefor were contained in it.[1]

§ 1120. Contrary rule — A peculiar case.— In an early case in the circuit court of the United States for the district of California, which was a case under a Utah statute, passed when the state of Nevada was a part of the territory of Utah, it was held that the statute passed in said territory on the general subject of real property and the conveyance thereof did not apply to mining claims.[2] But the probabilities are that no such doctrine would be announced by any court at this time, and that the rule as laid down in the preceding section may be said to be the true one.

§ 1121. Curative statutes.— Since the general rule throughout the entire country is that mining claims and mining interests are held as real property, obviously all statutes enacted for the purpose of affecting a correction as to defective conveyances will operate equally upon mining deeds and interests conveyed thereby.[3]

Article D.

Of Compromise Deeds.

§ 1124. Compromise deed generally operates as an end line in a lode claim.
1125. Metes and bounds produce a different rule.
1126. Miscellaneous deeds — Different names — Estoppel.
1127. Rule in other than lode mining — Parol evidence to explain.
1128. Deed without consideration.

§ 1124. Compromise deed generally operates as an end line in a lode claim.— Among the miners of the Pacific coast it is usually customary to convey an interest in a min-

[1] Evenson v. Webster, 3 S. Dak. 382, 53 N. W. Rep. 747, 44 Am. St. Rep. 802; Iron Co. v. Wright, 32 N. J. Eq. 252; Barksdale v. Hairston, 81 Va. 765. See also Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. Rep. 430.

[2] Kinney v. Cons. Va. M. Co., 4 Sawy. 382, 14 Fed. Cas. 611. See also Blodgett v. Potosi G. & S. M. Co., 34 Cal. 227.

[3] Carson v. Thompson, 10 Wash. 295, 38 Pac. Rep. 1116.

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ing claim by a certain number of linear feet, describing at the time the ground contained in the claim or a certain fractional part, undivided, of the claim.[1] It is often necessary, however, when conflicts arise, either as to the surface ground or subterranean lodes and bodies of ore, to compromise difficulties by establishing a compromise line, and deeding, one to the other, all ground on either side of it. As a general rule these compromise lines are drawn vertically. This is especially so if they are drawn crosswise of the lode. If they are lengthwise and parallel to the lode line, they are drawn vertically as to surface rights, but include, just as a congressional grant includes, all veins of ore apexing therein throughout their entire depth. This, of course, in the absence of express covenant. Where the parties have expressly covenanted as to and fully described their rights, they will, of course, be held rigidly to their bed as they have made it.

Thus, in a leading case from Nevada where two mining companies having claims adjacent to each other agreed upon a line of division between themselves, which should be continued downward toward the center of the earth, it was held that the line was to be extended downward through the zones of ore in the property in their course toward the center of the earth.[2] And in the same case in the circuit court, before Justice Field and Circuit Judge Sawyer and District Judge Hilyer, it was held that this compromise line must be treated as an end line and carried downward vertically, and extended in its own direction the same way. The court in the opinion says: "The line thus designated, extended down in a direct line along the dip of the lode, would cut the Potts chamber (the ore in dispute) and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and Champion were vein or lode claims, a line dividing them must be extended along the dip of the vein or lode, so far as

[1] See *ante*, §§ 1090–1093.

[2] Richmond M. Co. v. Eureka M. Co., 103 U. S. 846, 26 L. ed. 557.

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that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them if such were not the case."[1]

§ 1125. Metes and bounds produce a different result.— As intimated in the preceding section, where the compromise is as to side lines, in the absence of a covenant to the contrary, there would be a longitudinal division of the claim much the same as the ordinary severance of estates under other conditions. Where, however, the parties have compromised by a deed describing their rights by metes and bounds, the rule, of course, must be different, and as to that, unquestionably the grantee would be entitled to the surface ground conveyed with all the metals contained, and all the rights incident thereto. Thus, in a case in Montana where they compromised their disputes as to overlapping surface, there was an agreement that the St. Louis Mining Company should convey a certain strip of land thirty feet wide and four hundred and three feet long, which was really taken off a portion of the side line of the St. Louis claim,[2] and it was contended that the northernmost line of this strip was drawn vertically against the Drum Lummon vein, a side vein in that claim. In denying this result to the deed and in holding that it had the effect to convey all extra-lateral rights, and to reserve the same on the north side of the line as to the grantor, the court uses these words: "Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy; and the language of the contract and of the deed sustains that conclusion."[3] And this is but following the rule previously

[1] Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819. See also McCaig v. Stone, 9 Cal. 600.

[2] See *ante*, § 860, p. 763, Fig. 29.

[3] Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. Rep. 430, 433.

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noticed[1] of looking to the intention of the parties for a construction of their deed.

§ 1126. Miscellaneous deeds — Different names — Estoppel.— Where, after notices of location of the L. and E. mining claims were filed, the owners of the E. claim moved the stakes at one end so as to conflict with the L. claim, and then conveyed, by separate deeds, their interest in the E. claim as described in the notice of location, it was held that they were estopped to maintain, under a subsequent purchase of the L. claim, that their deeds conveyed no part of the latter.[2] And where the same lot of ground is covered by more than one location by the same grantor, his deed of one may be construed to convey the title under both locations.[3]

§ 1127. Rule in other than lode mining — Parol evidence to explain.— The dividing lines and boundary planes, described in deeds elsewhere than in lode-mining claims in the public-land states, are drawn vertically, except the imaginary lines between strata where the estates are severed, as we have seen. As an illustration: Where there was a grant of the metals and minerals in a certain tract, beginning at the center of the vein of iron on the line between two points, and, in trespass for taking the ore, there was conflicting evidence as to whether there was any such vein, or whether there was more than one vein, and whether the parties agreed upon a line of rocks as marking the supposed vein, and whether, if there was any vein, it was a vein of emery, and not a vein of iron; the line was drawn vertically, and the court ruled the deed stood unaffected by parol evidence as to boundary, but if more than one vein existed, parol evidence could be admitted to show what was intended. It was also held

See also Stinchfield v. Gillis, 107 Cal. 86, 40 Pac. Rep. 98.

[1] See *ante*, § 1115.

[2] Shreve v. Copper Bell M. Co., 11 Mont. 379, 28 Pac. Rep. 315.

[3] Morr. Min. Rights (8th ed.), 195; Weill v. Lucerne M. Co., 11 Nev. 200; Phillpotts v. Blasdel, 8 Nev. 61, 4 M. R. 841; Lebanon M. Co. v. Cons. Republican M. Co., 6 Colo. 371.

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to be immaterial whether it was iron ore or emery; also that the grant of the iron ore was a grant of the present estate in fee of the ore *in situ*, and gave the grantee possession so as to maintain an action against a trespasser who removed the ore.[1] Recognized boundaries and monuments which prove to have been inaccurately or indefinitely described in a deed may be established by proof that they were recognized as such by the parties.[2] Two deeds have been held as one transaction where one is given for the purpose of correcting the other, or where they are mutual conveyances.[3]

§ 1128. Deed without consideration.— In the federal court in North Carolina, where a deed was without express consideration, and purported to convey all the "mineral and metallic interests" in certain lands, the instrument being properly under seal and duly delivered, it was held that in that state, following the English statute obtaining in that state since 1715, such a deed would pass a freehold estate in the lands; but inasmuch as the deed further provided for plaintiff's ancestors, the grantees in the deed through whom the plaintiff acquired title, to make a fair test for minerals and metals on the aforesaid lands, that question of fact was submitted to the jury under an instruction that it constituted a condition subsequent, and a judgment for the defendants was upheld.[4]

Article E.

Of Bills of Sale and Verbal Transfers, When Sufficient.

§ 1131. Verbal transfers — Early California and similar doctrine.
1132. Transfers by bills of sale.

[1] Chester Emery Co. v. Lucas, 112 Mass. 424, 3 M. R. 343.

[2] Chester Emery Co. v. Lucas, *supra;* Waterman v. Johnson, 13 Pick. 261; Cook v. Babcock, 7 Cush. 526; Sargent v. Adams, 3 Gray, 72; Putnam v. Bond, 100 Mass. 58; Stoops v. Smith, 100 Mass. 63.

[3] Wallace v. Silsbey, 42 N. J. Law, 1, 3 M. R. 390; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. Rep. 186.

[4] Adams v. Ore Knob Copper Co., 7 Fed. Rep. 634.

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§ 1133. Same — Verbal transfers — Writings not under seal — How affected by recording statutes.
1134. Effect of recording statutes — Notice.
1135. Executory contracts for deeds.
1136. Doctrine of this chapter restated.

§ 1131. Verbal transfers — Early California and similar doctrine.— In California, before the enactment of the statute to the contrary, mining claims were regarded as mere possessory rights, and were transferred orally by delivery of possession. This unique mode of transferring real estate was not new, and had its birth at the common law before conveyances by deed were known, in the ceremony of livery of seisin. These conveyances were repeatedly recognized as valid and binding by the California courts.[1] This was affirmed by the supreme court of the United States.[2] But even in California in those times it was necessary to actually deliver possession, and that possession be retained by some notorious acts of ownership, such as to satisfy the statute and the requirements of the court.[3] In Colorado this doctrine was virtually supported, although that was not necessary to a decision of the case,[4] and it has been firmly set at rest in Montana.[5] But the correctness of the rule was disapproved, or at least doubted, at a later date,[6] where it was held that even though a verbal transfer might in some cases be good, it would not pass the title in that case, notwithstanding the fact that it was accompanied by delivery of possession. And still later, in a well-considered case, Mr. Justice Rhodes, speaking for the court, after taking up the cases authorizing and indorsing verbal transfers of mining claims, lays down this doctrine: "It is impossible to

[1] Jackson v. Feather River Water Co., 14 Cal. 18; Table Mountain Tunnel Co. v. Stranahan, 20 id. 198; Antoine Co. v. Ridge Co., 23 Cal. 219; Gatewood v. McLaughlin, 23 id. 178.

[2] Union Cons. S. Mining Co. v. Taylor, 100 U. S. 37.

[3] Patterson v. Keystone M. Co., 23 Cal. 575; Atwood v. Fricot, 17 id. 37; English v. Johnson, id. 107.

[4] Omar v. Soper, 11 Colo. 389, 18 Pac. Rep. 443.

[5] Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280.

[6] Goller v. Fett, 30 Cal. 482.

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reconcile those cases with the statute of frauds, except upon the ground taken in the leading case, that rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance, other than a transfer of possession, is necessary to pass them. The doctrine in those cases, however, has another bearing when the interest held in a mining claim is considered as real estate."[1] To which may be added that since the enactment of the federal statute treating mining claims from the inception as real property, these decisions are stripped of much of their force.

§ 1132. Transfers by bills of sale.—It was the practice in California, even after the enactment of the law of 1860 and other statutory provisions requiring the transfer of land by instruments in writing, to transfer mining claims by mere bills of sale, not under seal, and not acknowledged. And we think that it is not unreasonable to hold these transfers good.[2] This doctrine is no doubt sound, and would be sufficient to transfer the title in the absence of recording statutes, or statutes requiring an acknowledgment. It would certainly be sufficient to require a valid title to be made, and upon which to base a suit for specific performance, as it has been held that even a bad deed will be construed as a covenant to make a good one.[3]

§ 1133. Same—Verbal transfers—Writings not under seal—How affected by recording statutes.—So the doctrine of verbal transfers became settled law, and received

[1] Hardenbergh v. Bacon, 33 Cal. 356, 381.

[2] Myers v. Farquharson, 46 Cal. 190. See also Clark v. McElvy, 11 Cal. 154; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93; Sears v. Taylor, 4 Colo. 38, 5 M. R. 318.

[3] Barkley v. Tieleke, 2 Mont. 59; Sayward v. Gardner, 5 Wash. 247, 31 Pac. Rep. 761; Tarpey v. Deseret Salt Co., 5 Utah, 205; Adams v. Reed, 11 Utah, 480, 40 Pac. Rep. 720; Allegheny Co. v. Snyder, 106 Fed. Rep. 764; Barr v. Hatch, 3 Ohio St. 527; Williams v. Spriggs, 6 Ohio St. 585; Abbott v. Bosworth, 36 Ohio St. 605.

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the sanction of the supreme court of the United States.[1] And even where a writing was resorted to, being governed by the principle that they were mere possessory titles capable of passing by the transfer of possession, it became, and is yet, the settled law that in the absence of recording statutes or statutes requiring real estate to be transferred in a particular way, mining claims may be conveyed by bill of sale, which need not be under seal even in those states where seals were required.[2] And in any case, as we have seen in the last preceding sections, any writing made and passed, or possession given with the intention of passing the title and possession of the property, would be sufficient upon which to base an action for specific performance, and furnishes sufficient foundation for a good deed.

§ 1134. Effect of recording statutes — Notice. — Manifestly, wherever mining claims are regarded as real estate, the general rules governing the transfer of real property must prevail, and to be absolutely valid and conclusive as against creditors or subsequent purchasers, deeds must be executed, witnessed, acknowledged and delivered in substantially the manner required by the statute.[3] And to impart notice to third parties, of course they must be recorded.

§ 1135. Executory contracts for deeds. — This is governed so entirely by the general law on the doctrine of specific performance that we do not deem it necessary to take up much time or space in adverting to it here, simply remarking in passing that whatever contract is sufficient to enforce specific performance under general law is sufficient under the mining law. For instance, and for the purpose of distinguishing between a deed and an executory contract for a deed, plaintiff's grantors discovered a garnet mine on

[1] Union M. Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541.

[2] McCarron v. O'Connell, 7 Cal. 152; Draper v. Douglass, 23 id. 347.

[3] Hopkins v. Noyes, 4 Mont. 556, 2 Pac. Rep. 280; Robertson v. Smith, 1 Mont. 514; King v. Randlett, 33 Cal. 318; Felger v. Coward, 35 Cal. 650; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93; Houtz v. Gisborn, 1 Utah, 173.

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the public domain and acquired the right from the state to work the same upon a certain royalty. But before obtaining such right, they entered into a contract with defendant by which they agreed, for the consideration of five dollars per long ton royalty, to sell all or fifty tons of garnet out of the mine, with privilege to mine each and every year until all gone, etc. Plaintiff's grantors repudiated this contract, notwithstanding which the defendant took possession of the mine, and the court held that the contract under which the defendants claimed was not a conveyance, but simply an executory contract, giving the defendants no title to the estate of plaintiff's grantors in the mine nor any right to the possession thereof.[1] But such an executory contract is enforcible, and could be enforced the same as any other, and one occupying a fiduciary relation to another regarding a mining claim on the public domain, will be required to convey to such other person or stand as trustee for him.[2]

§ 1136. Doctrine of this chapter restated.— It will thus be seen that the general doctrine of the law of real estate is only different in its application to mining claims to the extent of the natural difference between the principles involved; the intent of the parties is generally to govern, where that can be gained either from the instrument itself and the surrounding circumstances or from parol testimony admitted within the general rules; that where several estates are created they are confined, each to its particular boundary and extent; that the consideration is important as governing the intention of the parties; that the general rule is that a specific intent controls a general intent; where two descriptions are inconsistent, that which more nearly approaches the specific intent will govern; that where compromise or dividing lines are established between two es-

[1] Moore v. Brown, 16 N. Y. S. 592, 66 Hun, 618. See also Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593.

[2] Lockhart v. Rollins (Idaho), 24 Pac. Rep. 413. In this branch of the law perhaps more than any other, each case is controlled by its

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tates, they are drawn down vertically if crosswise of a lode or vein, and likewise if applied to anything but a lode claim located under the laws of the United States; as to that, if running lengthwise of the claim and upon it, or parallel with it, the grantee gets the same rights in the land granted as the grantor or locator has, and the same rule applies to a conveyance by metes and bounds; that in the conveyance of an estate in lands less than the entire estate contained in the block of earth, that is, where there is a severance, all means necessary to obtain and enjoy the estate granted or reserved, are likewise by intendment, incorporated into and made a part of the grant; that verbal transfers and bills of sale are valid in the absence of statute requiring a particular form of conveyance, and are a contract for a good conveyance in any case.

own peculiar circumstances. Courts will therefore look to the contract under consideration, and, if possible, declare from its language, rather than its name, the rights of the parties under it. The contract, however, must generally be signed by the party against whom default is claimed. For instance, an indorsement, signed by the parties, on the back of a lease, that within a certain time the lessee will pay a gross sum in lieu of rental, which will entitle him to a conveyance from the lessor, is an absolute contract to purchase (Suffern v. Butler, 21 N. J. Eq. (6 C. E. Green), 410); while a bond executed by the obligor and delivered to the obligee, but not signed by him, conditioned that upon payment of a certain sum within a specified time the obligor will convey the property, amounts to an option to purchase merely; and the entry upon the premises by the obligee, without any payment, is not an exercise of it. Gordon v. Darnell, 5 Colo. 302. A contract providing for delivery of a deed when certain work is done, and payments, is only an escrow until these acts are done. Beem v. McKusick, 10 Cal. 538.

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CHAPTER II.

OF MINING LEASES AND SIMILAR INSTRUMENTS IN GENERAL.

ARTICLE A.

Definitions and Descriptions.

§ 1141. Preliminary and historical.
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§ 1141. Preliminary and historical. — Mining leases have been in use as a means whereby mines have opened and worked in England for several hundred years. The greatest portion of the mineral districts there are being and and have been so worked.[1] They have defined the relationship between mine owner and mine worker throughout the coal and iron districts of the United States for many years, and of late years they have been brought into extensive use in the Rocky Mountain and Pacific states and territories of this country.[2] Likewise they have been, and are now to a great extent, the means whereby the miner in Canada has secured work and operated mining lands.[3]

§ 1142. Historical — Mr. Bainbridge's view. — Supplemental to the matter stated in the last preceeding section, for the purpose of showing the antiquity of mining leases, and consequently the value of English decisions in interpreting them, we reproduce the views of Mr. Bainbridge upon the subject: "The greatest portion of the mineral districts of the kingdom, is worked under leases and licenses, and questions of importance are frequently arising with respect to the validity and construction of these instruments. The subject has, therefore, been reserved for distinct consideration. . . . When all the mines or quarries of any particular metal or mineral within certain lands form the subject of the demise, no dispute can well arise except with respect to the actual boundary of the surface, or that below corresponding with the surface. In such cases, all the specified

[1] Bainb. Mines (1st Am. from 3d Lond ed.), p. 197.

[2] Morr. Min. Rights (8th ed.), pp. 203, 208, 209; Hoosac M. & M. Co. v. Donat, 10 Colo. 529, 16 Pac. Rep. 157; Chambers v. Lowry, 21 Mont. 478, 54 Pac. Rep. 816; Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. Rep. 657; Bicknell v. Austin, 62 Fed. Rep. 432; Equator M. & S. Co. v. Guanella, 18 Colo. 548, 33 Pac. Rep. 613: Bullis v. Noyes, 12 S. W. Rep. 397; s. c., *sub nom.* Bullis v. Presidio M. Co., 75 Tex. 540; Silver City G. & S. M. Co. v. Lowry (Utah), 57 Pac. Rep. 11; Murray v. Heinze, 17 Mont. 353, 42 Pac. Rep. 1057.

[3] Fielding v. Mott, 14 Can. S. C. Rep. 254; Lynch v. Seymour, 15 Can. S. C. Rep. 341; Palmer v. Wallbridge, id. 650; Tupper v. Annand, 16 id. 718; McArthur v. Brown, 17 id. 61.

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products found within the lines of demarkation will belong to the lessee, but metals are usually deposited in veins or lodes, and not like coal, which is always found in a state of stratification corresponding, more or less, with the form of the surface. In such case it is not an uncommon practice to demise all the minerals within certain surface bounds; but it is also usual to demise only particular veins, or known or supposed deposits of metalliferous substances. These veins are demised for a certain length, and with a proportionate and adequate breadth. When there is only one adventure in operation within the same field little difficulty is experienced; for if a new vein is discovered in the course of the workings, the right to which it is desirable to acquire this desire may usually be gratified without infringing on the rights of other adventurers."[1]

§ 1143. Definition. — A mining lease may be defined to be a contract between the owner, generally called the lessor, and the miner, generally called the lessee, whereby the latter is authorized to take and hold possession of certain mining claims or mining property or portions of mines for a fixed period of time, or while a certain quantity of its product may be obtained, for a stipulated compensation in specie or in money.[2] Or it is a conveyance of a specified interest or portion of a mine for life, or for a fixed period of years, or at will, in consideration of rent or other recompense.[3]

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 208, 208, 209.

[2] Hyatt v. Vincennes Nat. Bank, 113 U. S. 408. See also 1 Co. Inst. 118; 2 Bl. Com. 386; 2 Kent Com. 342; Barr v. Doe, 6 Blackf. 535; Buhl v. Kenyon, 11 Mich. 249; Meni v. Rathbone, 21 Ind. 454; McElwaine v. Brown (Pa. St.), 11 Atl. Rep. 453; Kirk v. Mattier, 140 Mo. 23, 41 S. W. Rep. 202.

[3] Hyatt v. Vincennes Bank, *supra;* United States v. Gratiot, 14 Pet. 528; Knight v. Indiana Coal & Iron Co., 47 Ind. 105; Tarvin v. Risher, 52 Ind. 389; McDowell v. Hendrix, 67 Ind. 513; Harlow v. Lake Superior Iron Co., 36 Mich. 105; Diamond Plate Glass Co. v. Echelbarger, 24 Ind. App. 124, 55 N. E. Rep. 233; Jackson ex. dem. Webber v. Harsen, 7 Cowan, 323; Paul v. Cragnas (Nev.), 59 Pac. Rep. 857. See also Buchanan v. Cole, 57 Mo. App. 11, where a contract is held to be a lease which authorizes a party to go upon a particular piece of land and exercise the exclusive right to

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§ 1144. Same — General definitions of lease by the courts.—The supreme court of the United States has defined a mining lease to be a contract for the possession and profits of land for a determined period, with the recompense of rent.[1] This definition was enunciated in the course of an opinion by that court wherein it construed a contract made by the President of the United States for the working of certain lead mines on the upper Mississippi; but of course the rule would not be different in any case so far as the definition of a lease is concerned. The contract in this case was made for one year, under the statute authorizing the President to lease for five years, and it was held to be a lease. So also where a lease granted for the term of fifty years "all mineral coal, iron ore, fire and potter's clay, limestone, building stone and other minerals upon and under the farm or tract of land," with exclusive right to enter on the land and dig for the articles named, which right was sold under execution as real property under an Indiana statute, making and defining chattels real to be real estate, the sale was upheld and the instrument declared to be a lease.[2]

§ 1145. Of leases and similar instruments — What is and what is not a lease.— To determine in all cases to a technical nicety, what is or is not a lease, is a matter of no small difficulty.[3] Courts do not now agree, and never have agreed, substantially even upon the point.[4] Some courts

mine thereon; Young v. Ellis, 91 Va. 297, 21 S. E. Rep. 480.

[1] United States v. Gratiot, 14 Pet. 526, 533; followed in Raynolds v. Hanna, 55 Fed. Rep. 783; Pelton v. Minah Cons. M. Co., 11 Mont. 281, 28 Pac. Rep. 310. See also Moore v. Miller, 8 Pa. St. 272.

[2] Hyatt v. Vincennes Nat. Bank, 113 U. S. 408. See also cases cited, note 2, p. 933, *ante;* Heywood v. Fulmer (Ind., unreported), 18 L. R. A. 491, 32 N. E. Rep. 574; Patton v. Axley, 50 N. C. 440; Consolidated Coal Co. of St. Louis v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Barry v. Smith, 69 Hun, 88, 23 N. Y. Supp. 261. Compare Wilson v. Youst, 43 W. Va. 826, 28 S. E. Rep. 781.

[3] Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 32 N. E. Rep. 1078.

[4] Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970; Hudepohl v. Liberty Hill Cons. M. Co., 80 Cal. 553, 22 Pac. Rep. 339; Harrington v. Wood,

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holding particular instruments to be leases, while others have held exactly the same kind of an instrument to be either a license or a sale of the product.[1] The general rule deducible from the best considered cases, so far as they can be reconciled, seems to be that it is unimportant what particular name is given to the contract or instrument, so long as it defines the rights, duties and obligations of the parties between themselves, and is sufficiently certain to be enforceable.[2]

§ 1146. Special and peculiar cases — Rent is income and not corpus of estate — When lease conveys interest in land — When mineral merely. — In Ohio, the decedent demised certain lands to a mining company at a fixed royalty of ten cents per ton, and sufficient was to be mined to pay five thousand dollars a year, and at least four hundred and sixteen dollars and seventeen cents was to be paid each month, whether the mine was operated or not. Under the construction of the will by the federal court, it became material whether this royalty and rent was income or part of the *corpus* of the estate. And while the mining company was not in court and the fact being that it had paid the rent monthly for several years without opening the mine at all, the court decided, first, that this was a lease, notwithstand-

6 Ohio Cir. Ct. Rep. 826; Ohio Oil Co. v. Kelly, 9 id. 511; Young v. Ellis, 91 Va. 297; Cons. Coal Co. of St. Louis v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Paul v. Cragnas (Nev.), 59 Pac. Rep. 857.

[1] See authorities in last note: Wilson v. Youst, 43 W. Va. 826, 28 S. E. Rep. 781.

[2] Sanders' Case, 5 Co. 12; Taylor v. Salmon, 4 Myl. & C. 134; James v. Cochrane, 7 Ex. 170; Friar v. Grey, 15 Q. B. 901; Wilmington Star M. Co. v. Allen, 95 Ill. 233; Gartside v. Outley, 58 Ill. 210; Austin v. Huntsville Coal & M. Co., 72 Mo. 533; Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593; Shaw v. Wallace, 25 N. J. Law, 453; Suffern v. Butler, 21 N. J. Eq. 410; Scioto Fire Brick Co. v. Pond, 38 Ohio St. 65; Moore v. Miller, 8 Pa. St. 272; Watson v. O'Hearn, 6 Watts, 362; Kemble v. Coal & Iron Co., 90 Pa. St. 332; Waterson v. Reynolds, 95 Pa. St. 474; Freck v. Locust Mountain Coal & M. Co., 86 Pa. St. 318; Bowyer v. Seymour, 13 W. Va. 12; Williams v. Jones, 39 W. Va. 231.

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ing it was an unopened mine; second, the executor had the right to continue the lease in the form of a renewal, and third, that the royalties derived from the lease were income within the meaning of the testator's will.[1]

It has been held by the supreme court of Pennsylvania that a lease of a right to mine coal is a grant of an interest in the land and not a mere license to mine.[2] And this is also the rule in New Jersey.[3]

Somewhat opposed to this doctrine is a recent decision by the circuit court of appeals for the fourth circuit, where it is held, following the decisions of the supreme court of West Virginia, in which state the case originated, that a lease of all the oil and gas in and under the tract of land described, "and also the said tract of land for the purpose of operating thereon for oil and gas," where the sole compensation is a share of the product to be obtained by operating the property, is not a grant of the property in the oil or in the land until oil or gas is found, but merely a grant of possession for the purpose of exploring for oil or gas.[4] The most that can be said of these and similar instruments is that each must be construed according to the intention of the parties as gathered from the lease or instrument itself, and the surrounding circumstances; that the name bestowed upon it is unimportant, but that the rights granted should be protected under the general rules of law by which written instruments are interpreted.

[1] Raynolds v. Hanna, 55 Fed. Rep. 783, citing on this point Daly v. Beckett, 24 Beav. 114, 123; Wentz's Appeal, 106 Pa. St. 301; McClintock v. Dana, 106 Pa. St. 386; Williard v. Williard, 56 Pa. St. 119; Bedford's Appeal, 126 Pa. St. 117, 17 Atl. Rep. 538.

[2] Harlan v. Lehigh C. & N. Co., 35 Pa. St. 287; Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. Rep. 443. See also Kitchen v. Smith, 101 Pa. St. 452; Brown v. Beecher, 120 Pa. St. 452, 15 Atl. Rep. 608; Harrington v. Wood, 6 Ohio Cir. Ct. Rep. 326.

[3] New Jersey Zinc Co. v. Boston Franklinite Co., 13 N. J. Eq. 322.

[4] Huggins v. Daley (C. C. A.), 99 Fed. Rep. 606. See also Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. Rep. 978; Cowan v. Radford Iron Co., 83 Va. 347.

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§ 1147. Miscellaneous matters connected with leases — Some essentials.— Obviously, the lease should state with reasonable certainty, the nature, quality and extent of the estate demised and its duration, and should give full liberty to work the mines; and where the same are severed from the surface, the right to occupy sufficient surface ground, although that would be implied, and should provide the stipulated rent, royalty or compensation. In short, all covenants and stipulations not obivously implied by law, and all rights intended to be conferred should, and generally must, be clearly expressed on the face of the instrument.[1]

§ 1148. Same subject — Further essentials of a lease.— The common experience with mining leases has demonstrated that certain essential elements should be observed in the preparation of these instruments. As a guide, and from the best considered cases, the following essentials may be enumerated:

(a) It should provide for the amount of work to be done, and the period of cessation, not caused by injunction or other unavoidable circumstance, or consented to by the lessor, necessary to work a forfeiture. Where royalty is reserved in the usual form there is an implied covenant to keep at work.[2]

(b) If timbering is required it should be provided for, and in the absence of covenant for special or particular timbering, usual and customary timbering will be sufficient.[3]

(c) It should provide for the ownership and means of operating such machinery as is already on the premises or may be placed there during the period of the lease; the disposition to be made of it at the expiration, and if it is to remain the property of the lessee, the time after expiration or forfeiture

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 188; Genet v. Delaware & Hudson Canal Co., 132 N. Y. 593, 32 N. E. Rep. 1078; Mickel v. Douglas, 75 Iowa, 78, 39 N. W. Rep. 196.

[2] Roarer Co. v. Trout, 83 Va. 397; Meyer v. Marshall, 34 W. Va. 42, 11 S. E. Rep. 730.

[3] See No. 5 M. Co. v. Bruce, 4 Colo. 293. See form of lease in Hill v. Sumner, 132 U. S. 118.

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of the lease within which he will be permitted to remove it. In the absence of provisions to the contrary, fixtures placed on the property by him are the property of the lessee, and he may remove them within a reasonable time.[1]

(d) It should provide for inspection by the lessor; this for mutual protection, that the lessor may know whether work is being prosecuted according to contract, and that the lessee may be advised if it is not.

(e) If the lease in not to be assigned, it should so provide; otherwise the lessee having certain rights of property by virtue thereof, should be free to do with it as he likes, being responsible to the lessor only for the performance by his assignee of the covenants of the lease. Of course, the privity of estate between the parties makes the assignee liable for the rents, and the lessee, at most, only his surety.[2] The supreme court of Pennsylvania has held under rather peculiar circumstances, that the assignor of a lease is liable to the lessor notwithstanding subsequent modifications.[3] Of course, the assignee of a lease is not liable for a breach of covenants occurring before the assignment.[4] It has been held that while a condition in a lease for years or life to the effect that it will be void if assigned, still the lessee is not prevented thereby from taking others in with him or from making a sublease.[5]

(f) To pay a fixed royalty or rent for the use of the mine, generally proportioned to the quantity of ore actually raised, and without any certain stipulated rent in money. It is a common practice to provide that the rent shall be paid in money according to the market price of the product on that day, or by the delivery of metals or the ore on the dump.[6]

[1] Conrad v. Saginaw M. Co., 54 Mich, 294, 20 N. W. Rep. 89.

[2] Watson Coal Co. v. Casteel, 78 Ind. 296; Hodgson v. Perkins, 84 Va. 706, 5 S. E. Rep. 710; Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. Rep. 443.

[3] Fisher v. Miliken, 8 Pa. St. 111.

[4] Washington Nat. Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. Rep. 799.

[5] Hargrave v. King, 8 Ired. Eq. 430.

[6] Rockw. Mines, 558; Bainb. Mines, 207.

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(g) It is also customary to provide that at the expiration of the lease, the lessee will quit and deliver up the demised premises in good order, not himself suffering any waste or unnecessary injury. Of course this provision as to waste merely means that he will not wantonly injure the estate.

Wherever there are statutory provisions as to leases, they are supposed to be made with reference to such provisions.

§ 1149. Covenants on the part of the lessor. — We have thus gone over at some length, the requirements of the general covenants. Each particular case will probably suggest the advisability of certain other special covenants. It will not be necessary to further enlarge upon this matter. The covenants on the part of the lessor are generally for title and quiet enjoyment. The remaining intention of the parties is generally effected by provisos or conditions. These differ from covenants in this respect, that they are binding on both parties, and a covenant is only binding on the covenantor. It may often be preferable also to have mutual covenants. When there is no penalty fixed for the non-performance of a condition it will amount to a covenant.[1] A proviso indeed in many instances will amount to a covenant. The usual provisos are for re-entry on non-payment of rent or non-performance of the covenant, and a stipulation to that effect on the part of the lessee, and for referring all disputes to arbitration.[2] Such may be considered the usual contents of a mining lease. There are special matters peculiar to these instruments, which have been discussed at some length by the courts. We will proceed to examine them.

§ 1150. Same, by lessee — Covenants and conditions generally.— The covenants of the lessee, besides the payment of rent or royalty, are that he will not assign or sub-let,

[1] Doe ex dem. Wilson v. Phillpotts, 2 Bing. 13; Doe ex dem. Antrobus v. Jackson, 8 B. & Ad. 402.

[2] Rockw. Mines, 561.

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where this is made one of the conditions;[1] for good mining, which is an essential provision, and one almost always included;[2] and for peaceful surrender of the premises at the expiration. All these questions will receive attention further on.[3]

A lease has sometimes been held to be a disposition of the property. Thus, in a case arising in Colorado, where a contract was made between the parties, employing the words "sell or dispose of" as effecting a condition in a contract it was held that a leasing of the property was a disposition of it within the meaning of that contract.[4]

It has also been held that a lease was not exclusive,[5] but we apprehend that this is an extreme case, and that if it is a lease at all as contradistinguished from a mere license, the rights of the lessee within the boundaries of the leased premises must necessarily be exclusive.

§ 1151. Of the making and execution of a lease — Formalities — The statute of frauds. — It may be stated as a general rule that the statute of frauds, both in England and in this country, generally requires leases for more than one year to be in writing and signed; they must usually be witnessed and should be attended with the same formality of execution as ordinary sealed instruments, if intended for record. It may be stated that, to avoid mistakes and trouble, a lease should be carefully and properly executed by all the parties to it, and if executed by a corporation, it should be authorized; but a corporation accepting the profits and royalty of a lease will be held to have waived any informality in its execution.[6] The same rule will apply to an individual.[7]

[1] See Wilmington Star M. Co. v. Allen, 95 Ill. 288.

[2] Walker v. Tucker, 70 Ill. 527; Burgner v. Humphrey, 41 Ohio St. 340.

[3] See *post*, §§ 1179, 1200, 1251 *et seq.*

[4] Hill v. Sumner, 132 U. S. 118, 33 L. ed. 284. See also Phelps v. Harris, 101 U. S. 380; Dennison v. Chapman, 105 Cal. 447, 39 Pac. Rep. 61; Badger Silver M. Co. v. Drake, 88 Fed. Rep. 48. Compare Ober v. Schenck (Utah), 65 Pac. Rep. 1073.

[5] Haven v. Hughes, 27 Ont. App. 1.

[6] Equator M. Co. v. Guanella, 18 Colo. 548, 33 Pac. Rep. 613.

[7] Chamberlain v. Parker, 45 N. Y. 569, 10 M. R. 144.

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And the receipt of rent is evidence of ratification.[1] And while, as a general rule, the acceptance must be with "knowledge of the facts," yet an individual will be presumed to know,[2] and very slight evidence will establish knowledge on the part of a corporation. Men generally know upon what account they receive money, and if they do not take the trouble to inform themselves they will be bound by the bare receipt.

§ 1152. Leases by parol — When a lease, when a license.— In many cases a parol lease, unless partly executed in such a manner that its revocation would work a fraud, will be construed as a mere license. But parol licenses and leases, if not void under the statute of frauds, will be upheld,[3] and they are not considered void under the statute of frauds even, if possession is taken under them, and they are partly executed.[4] The distinction between a lease and a license is that a license is generally revocable at the will of a licensor, while a lease for a term, or for a specified quantity of ground, mineral or coal to be removed, is not in general hampered with this infirmity.[5]

§ 1153. By estoppel and operation of law — And herein as to extensions and renewals.— Pursuing the principle announced in the last preceding section, that where the circumstances are such that the lessee has been led to the expenditure of money and time so that he cannot be placed in *statu quo*, this creates an estoppel in the lessor and operates as

[1] Blewett v. Coleman, 40 Pa. St. 45, 11 M. R. 100; Griffin v. Fellows, 81 Pa. St. 614, 8 M. R. 657; Doe v. Morse, 1 B. & Ad. 365; Doe v. Crago, 6 C. B. 90; Trout v. McDonald, 83 Pa. St. 114; Gartside v. Outley, 58 Ill. 210, 10 M. R. 566; Chamberlain v. Collinson, 45 Iowa, 429, 9 M. R. 36.

[2] Chamberlain v. Collinson, *supra*.

[3] Massott v. Moses, 3 S. C. 168; Muskett v. Hill, 2 Bing. N. C. 654; Doe v. Wood, 2 B. & Ald. 374; Offerman v. Starr, 2 Pa. St. 394; Boone v. Stover, 6 Mo. 430; Ruffatti v. Societe, etc. de Lexington, 10 Utah, 386; Clegg v. Jones, 43 Wis. 482.

[4] Ruffatti v. Societe, *supra*.

[5] Offerman v. Starr, *supra;* Boone v. Stover, *supra;* Massott v. Moses, *supra*.

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a lease.[1] As to waiver and estoppels themselves in such cases, they are generally questions of fact for the jury. So, where there has been an abandonment of work, but a payment of rent, the reception of rent, even though it be the minimum rent, as sometimes provided in oil and gas leases, works as an estoppel as to other covenants until notice to resume is given and a reasonable time allowed therefor.[2] Likewise where there has been a parol agreement for extension or renewal, and possession continued and money spent upon it, or in pursuance of it, it will be enforced.[4]

§ 1154. Descriptions in general — Subject of the lease. While it would generally be considered unjust to construe a lease, so far as it concerns the thing demised, in a narrow and technical spirit,[5] yet the subject of the demise should be described with such reasonable certainty as to enable those bound to construe it to arrive at a just conclusion as to its meaning, and when this is accomplished the law is satisfied and it will be enforced accordingly.[6] For example, where the agents of defendant's lessor went with him upon the ground and "let him have the level range exclusively west of the graveyard shaft," and the lessor accepted the customary rent for a part of the time, and its successor in interest by sheriff's deed, the plaintiff in the action, sought to dispute the tenancy, or at least to limit it to the cap rock, it

[1] Griffin v. Fellows, 81 Pa. St. 114; Doe v. Morse, 1 Barn. & Ad. 365; Chamberlain v. Collinson, 45 Iowa, 429; Gartside v. Outley, 58 Ill. 210.

[2] Weeling v. Kroll, 78 Wis. 636, 47 N. W. Rep. 943.

[3] Whitehead v. Bennett, 4 L. T. (N. S.) 818; Chamberlain v. Collinson, *supra;* Griffin v. Fellows, *supra;* Wheeling v. Phillips, 10 Pa. Sup. Ct. 634.

[4] *Ante*, § 1135; *post*, this Part, ch. VIII.

[5] Chamberlain v. Collinson, 45 Iowa, 429; Paul v. Cragnas (Nev.), 59 Pac. Rep. 857; Harlow v. Lake Superior Iron Co., 36 Mich. 105; Watson v. O'Hearn, 6 Watts, 362; Jones v. Shears, 7 A. & P. 346; Newton v. Nock, 43 L. T. (N. S.) 197; Moore v. Miller, 8 Pa. St. 272; Trout v. McDonald, 83 Pa. St. 144; Jegon v. Vivian, L. R. 6 Ch. App. 742; Gartside v. Outley, 58 Ill. 210; Tiley v. Moyers, 25 Pa. St. 397.

[6] Burr v. Spencer, 26 Conn. 159; Brainard v. Arnold, 27 id. 478; Watson v. O'Hearn, *supra;* Moore v. Miller, *supra.*

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was held that the acceptance of rent ratified the lease, and the defendant was entitled to hold just what was pointed out to him west of the graveyard shaft.[1]

§ 1155. Description — Land and estate — Extent and quantity demised — Entry under lease — Adverse possession — Harlow v. Iron Co. reviewed — Laches. — In a Michigan case, where B. leased to G. in consideration of $500 an undivided one-half of a certain one hundred and sixty acre tract, with full right and power to mine and convert to his own use the minerals for ninety-nine years, together with the use of necessary surface ground, but not to interfere with the farming right, no possession was taken under this lease except to build a cabin on the land some six years after the lease. The Lake Superior Iron Company seems to have afterwards succeeded to whatever interest B. had in the land, and G. also conveyed his interest, or a part thereof, in undivided portions to several of the plaintiffs, who brought ejectment and were defeated,[2] and then brought a suit in equity to determine their interest, and were defeated on the ground of laches.[3]

In the course of the opinion in the ejectment suit many instructive propositions of law were laid down which are worthy of consideration in connection with the matter in hand. Thus, while this lease was indefinite as to the exact estate granted, in this, that it was an undivided estate giving the right to prospect all over the land, yet the court say no narrow or technical construction of a lease should be indulged, but the lessee was only entitled to the land for mining purposes, and those incidental. But it did not give him the right to carve his estate into several distinct estates, but on the contrary all change of interest should be by those in privity with him as partners or the like.[4] Furthermore,

[1] Chamberlain v. Collinson, 45 Iowa, 429.

[2] Harlow v. Lake Superior Iron Co., 36 Mich. 105, 9 M. R. 47.

[3] Harlow v. Iron Co., 41 Mich. 588, 3 M. R. 285. See also cases cited, 8 M. R. 291.

[4] Id., 36 Mich. 105, 9 M. R. 47; Caldwell v. Fulton, 31 Pa. St. 476, 3 M. R. 288.

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that the right so granted was not exclusive and did not prevent the granting of similar rights to others.[1] Upon the latter ground the court refused to sustain the action of ejectment, and upon filing a bill in equity the plaintiff was turned out, as we said, on the ground of laches.

It is difficult to sustain either opinion. We think that the lease was a severance of an undivided half of the mineral estate from the surface estate. The description was sufficient, and the title being one of record the possession of defendant was that of a co-tenant, and it was erroneous to sustain the plea of laches. True, the plea should be sustained in a mining case much more readily than almost all other cases, for the reason that mining property is of fluctuating value, and no person should be permitted to remain silently by while mining property is being developed by the means and energy of another; but where the right is an undivided one, as in the case considered, and, too, one of record, which can be permitted to remain dormant without injury to interested persons, and where a complete severance for a term has been accomplished, as there, the rule should not be so strictly applied.

§ 1156. What is and what is not a lease.— In Illinois it has been held that a grant of lands to mine for coal, so long as there is coal to mine therein, with leave to take, under certain conditions, all the coal in the lands, and also containing mutual covenants, and a provision of forfeiture in case of non-compliance, was to be construed as a lease.[2] So, a written agreement by the owner of coal land giving another the exclusive right to mine coal on such land for a term of years is not a mere license, but is an assignable lease.[3]

[1] Harlow v. Lake Superior Iron Co., 36 Mich. 105, 9 M. R. 47; Chetham v. Williamson, 4 East, 476, 9 M. R. 176; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 322, 13 M. R. 120; Union Pet. Co. v. Bliven Pet. Co., 72 Pa. St. 173, 3 M. R. 107; Cardigan v. Brown, 60 Pa. St. 23.

[2] Gartside v. Outley, 58 Ill. 210, 10 M. R. 566.

[3] Cons. Coal Co. v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Harlan v.

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In New York, a memorandum of agreement leasing all the coal in or under a parcel of land specifically described, the amount of which is to be actually determined by the result of the mining process, was held to be a lease and not a deed;[1] and an exclusive right to enter and mine and remove coal, and to use so much of the surface as is necessary, paying a royalty on a certain minimum sum per year is a lease.[2] So, in Wisconsin, an instrument conveying an interest in land for a certain time, with an exclusive right to mine, paying therefor a rent in the ore, being a rent in kind, was held to be a lease.[3]

As previously stated, leases may be in parol, and when not void under the statute of frauds, being for less than one year, or as the statute of frauds of a particular state may require, are valid and binding the same as a written lease.[4] And a grant of phosphate beds, with an exclusive right to work them for the term, is a lease and not a mere license.[5] So, a contract by which the owner of mining lands allows a person to go to a particular part thereof and have exclusive right to dig for minerals thereon, so long as he complies with the terms and conditions of the contract, is a lease although it has no determined period.[6]

So, where one was allowed to enter and search for minerals, agreeing to pay a certain sum if no minerals were found, and a royalty on all ores shipped, the instrument will be construed to be a lease.[7] But the California court, in order to uphold the contract and evade the shoals presented by the statute of that state, held that where a cor-

Coal Co., 35 Pa. St. 287; Marquis of Bute v. Thompson, 13 M. & W. 487. For an instrument held to constitute a lease from year to year, see Patton v. Axley, 50 N. C. 440.

[1] Genet v. Delaware & H. Canal Co., 37 N. Y. Supp. 1087; s. c., 132 N. Y. 593, 32 N. E. Rep. 1078; Raynolds v. Hanna, 55 Fed. Rep. 783.

[2] Raynolds v. Hanna, *supra*.

[3] Ganter v. Atkinson, 35 Wis. 43.

See also Ruffatti v. Societe, etc. de Lexington, 10 Utah, 386, 37 Pac. Rep. 591.

[4] See authorities in last preceding note. See also Clegg v. Jones, 43 Wis. 482, 7 M. R. 572; *ante*, § 1152.

[5] Massott v. Moses, 3 S. C. 168.

[6] Buchanan v. Cole, 57 Mo. App. 11.

[7] Young v. Ellis, 91 Va. 297, 21 S. E. Rep. 480.

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poration agreed to lease to plaintiff for one year the right to work and mine certain mining ground, the gross products thereof to be divided between plaintiff and defendant, it was not a lease, but an agreement to work a mine.[1] This California case, however, is like some other decisions from that state, one resulting from expediency merely, and not from the apparent law of the case.[2]

§ 1157. Of the extent of the subject demised — Construction of lease.— As to whether all coal, iron or other ore is included, as also whether unopened mines are comprehended, has been a source of difficulty.[3] And while the rule with reference to unopened mines is not so rigid as formerly, nor so exacting in this country as in England, the lessee will generally be held within the exact lines of his demise, reasonably and fairly interpreted.[4] But a lease of all merchantable coal under a particular piece of land is not restricted to any particular vein, and includes all veins, even those which at the time are unprofitable to work.[5] So it has been said of opened or unopened mines,[6] though it is sometimes a question of fact as to what is intended;[7] and the general rule may be laid down that the intention of the parties will be sought for in the instrument and the surrounding circumstances, and, when ascertained, the lease, so reasonably and fairly interpreted, will be enforced.[8]

[1] Hudepohl v. Liberty Hill M. Co., 80 Cal. 553, 22 Pac. Rep. 339.

[2] See Equator M. & S. Co. v. Guanella, 18 Colo. 548, 33 Pac. Rep. 613.

[3] See note 8; also next succeeding section.

[4] Maloney v. Love (Colo. App.), 52 Pac. Rep. 1029; Cons. Coal Co. v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. Rep. 925; Buchanan v. Cole, 57 Mo. App. 11; Gribben v. Atkinson, 64 Mich. 651; Murray v. Heinze, 17 Mont. 353, 42 Pac. Rep. 1057; Byrnes v. Douglas, 23 Nev. 83, 42 Pac. Rep. 798.

[5] Re Maffet's Estate (Pa. Orph. Ct.), 9 Kulp, 186.

[6] Sander's Case, 5 Coke, 12; Harlow v. Lake Superior Iron Co., 36 Mich. 105.

[7] Tiley v. Moyers, 25 Pa. St. 397. Compare Kamphouse v. Gaffner, 73 Ill. 453.

[8] Phillips v. Jones, 9 Sim. 519; Carr v. Benson, 2 L. R. Ch. 524; Hyatt v. Vincennes Nat. Bank, 113 U. S. 408; First Nat. Bank v. G. V.

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§ 1158. New mines — Who may open. — Under some of the older decisions a very great distinction was made between operating a mine leased and opening a new mine. A life tenant, for instance, was not permitted to open new mines. It was waste if he did. And even now in the coal regions it may be doubted whether, in the absence of a stipulation in the contract itself, the lessee is permitted to open a new mine.[1] Under the older authorities the opening of new mines is waste unless the lease is of all mines on the land,[2] and the surface lessee might not in any case open a mine.[3] But a lease which gives the right to take out all the coal beneath certain surface confers on the lessee the right to make all necessary openings to reach the coal, and the lessee is not restricted to a single opening.[4] In Michigan it has been held that a lessee of land for years is entitled to work an open mine upon the premises unless restricted by the terms of his lease, but he has no right to open new mines unless this privilege be expressly granted.[5]

§ 1159. Rights acquired by, generally. — A mining lease requiring the lessee to mine a certain number of tons of ore annually, and to pay therefor a fixed sum per ton, or, failing

R. M. Co., 98 Fed. Rep. 449; Polk, etc. Bank v. Foote Co., 58 Fed. Rep. 845; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, affirming s. c., 33 Fed. Rep. 677; Higgins v. California Petroleum, etc. Co., 109 Cal. 304, 41 Pac. Rep. 1087; Diamond Plate Glass Co. v. Curtis (Ind. App.), 52 N. E. Rep. 782; Indianapolis Gas Co. v. Teters, 15 Ind. App. 475, 44 N. E. Rep. 549; Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. Rep. 66; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196; Oskaloosa College v. Western Union Fuel Co. (Iowa), 54 N. W. Rep. 152; Van Meter v. Chicago, etc. Coal Co., 88 Iowa, 92, 55 N. W. Rep. 106; Austin v. Huntsville M. Co., 72 Mo. 535; Ray v. Western Pa. Gas Co., 138 Pa. St. 576, 20 Atl. Rep. 1065; Letherman v. Oliver, 151 Pa. St. 646, 25 Atl. Rep. 309; Shenandoah L. & A. Co. v. Hise, 92 Va. 238, 23 S. E. Rep. 303; Oglesby v. Hughes, 96 Va. 115, 30 S. E. Rep. 489.

[1] Owings v. Emery, 6 Gill, 260, 8 M. R. 387; Astray v. Ballard, 2 Mod. Rep. 193 (K. B.), 8 M. R. 316.

[2] Owings v. Emery, *supra*.

[3] Griffin v. Fellows, 81 Pa. St. 114, 8 M. R. 657.

[4] Trout v. McDonald, 83 Pa. St. 144, 9 M. R. 32.

[5] Harlow v. Lake Superior Iron Co., 36 Mich. 105, 9 M. R. 47.

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to take out such quantity, to pay therefor the minimum rent, imposes no obligation upon the lessee to pay for such stipulated quantity after the ore in the demised premises has become exhausted, if it becomes exhausted before the end of the term.[1] Where there was a provision authorizing the abandonment of property, it was held that the lessee was not bound to open new mines before exercising such right.[2]

§ 1160. When lessee is entitled to entire product and when not.— In coal leases in some of the states there have been inserted provisions allowing the lessor to take away and dispose of the coal passing through a certain sized screen, and in others to take away culm, so called; while in certain mining leases in the west there have been reservations of the second class and concentrating ores, and ores not marketable without concentrations; in still other leases, both of coal and the precious metals, the lessee has been permitted to take and remove the entire product; and he is entitled to take and remove it, and to dispose of it as best he may, naturally and on principle, unless there are some restrictions in the lease or contract. There have been such, as we have intimated, and we will proceed to examine them: Thus, the owner of land granted by lease the right to search for mineral and fossil substances therein, and to conduct mining and quarrying operations, and it was provided that a certain sum per ton should be paid for all zinc and other ores removed by the lessee; all the mining operations under this lease consisted in crushing the rock containing the zinc ore and then washing out the latter, and it was on the ore so washed out that the royalty was to be paid; the refuse was found to be valuable for making artificial stone, etc.; and it was held that the lessee was not entitled to this refuse matter under the terms of the lease, and

[1] Ridgely v. Iron Co. (C. C.), 53 Fed. Rep. 988; Crow v. White Breast Fuel Co., 88 Iowa, 136, 55 N. W. Rep. 205.

[2] Van Meter v. Chicago & V. M. Coal M. Co., 88 Iowa, 92, 55 N. W. Rep. 106.

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that an injunction would lie at the suit of the lessor to restrain its removal from the land.[1] It has been held that the fact that such refuse contains a small per cent. of zinc is not sufficient to entitle the lessee to claim it as ore under his lease, especially when it cannot be profitably separated.[2] This is undoubtedly an extreme case, and the decision was only justified under the peculiar terms of the lease.

§ 1161. Same — Culm and unmarketable coal. — It has also been held that a lease providing for royalty on all coal which will pass over a certain mesh, reserving to the lessor all "culm," which in this case only meant "unmarketable coal," does not entitle him to payment for coal sold by the lessee which will pass through such a mesh.[3] In this case it appeared that coal which would pass over the screen in question, though not marketable at the date of the lease, became so later. Since the coal reserved to the lessor as "culm" was only such as could not be marketed, it is difficult to see how the court could have reached any other conclusion.

§ 1162. Other rights and duties considered — Rights of way, etc. — Where a lessee was granted a lease in certain lands, with a right to go through them and to mine other adjoining lands, it was held that such a right could not be exercised until the first mine was mined out and exhausted.[4] This is another extreme case, but was justified by the extreme language of the agreement under consideration. And where a contract leasing coal lands merely provides that the lessee has leased the coal underlying his land, the lessee is not bound to sink the shaft on the lessor's land.[5] This, of course, upon the assumption that the coal belonged to the lessee and he could mine it any way he

[1] Doster v. Friedensville Zinc Co., 140 Pa. St. 147, 21 Atl. Rep. 251.

[2] Doster v. Zinc Co., *supra*.

[3] Lance v. Lehigh Coal Co., 163 Pa. St. 84, 29 Atl. Rep. 755.

[4] Genet v. Delaware & Hudson Canal Co., 37 N. Y. S. 1087.

[5] King v. Edwards, 82 Ill. App. 558.

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chose, in the absence of an agreement to the contrary, which is undoubtedly the law.

§ 1163. Reservations — What included in, generally.— We have elsewhere outlined the doctrine of reservations in the lease, as where the lessor reserves some right or interest in the product to himself other than the royalty. Not to repeat too much, reservations are just as proper and it is just as competent for the lessor to make them in leases as in other instruments, and the same rule applies. Care must always be taken not to make the reservation as large as the grant; anything short of that will hold; but the reservation of the agricultural use to the lessor of all premises not needed for mining purposes, while proper in a mining lease, is inconsistent with an intent to grant an ordinary lease-hold interest.[1]

In construing a lease, the same as a will, it is contrary to well-settled rules to give to it a narrow and technical interpretation, based upon some particular word or clause; the intent of the parties must be gathered from an examination of the instrument and the circumstances attending its execution, and all clauses must be made consistent if possible.[2] A reservation in a lease, otherwise competent, is not extinguished because the lease is canceled, especially where the reservation itself has been assigned;[3] and a reservation of the ground in given directions from a designated building includes the surface and everything under it.[4] But the general principle that the lease carries with it the mines upon the land applies only where the contract relates to the land generally, without exception or reservation.[5]

[1] Harlow v. Lake Superior Iron Co., 36 Mich. 105; Raine v. Anderson, 4 Bing. N. C. 702; Reliance Coke Co. v. Kentucky Coke Co., 93 Tenn. 191, 23 S. W. Rep. 1095.

[2] Harlow v. Iron Co., *supra;* Watson v. O'Herne, 8 M. R. 333, 6 Watts, 362; Moore v. Miller, 8 Pa. St. 272. See also note 8, *ante*, p. 946.

[3] Farnum v. Platt, 8 Pick. 339, 8 M. R. 330.

[4] Oskaloosa College v. Western Union Fuel Co. (Iowa), 54 N. W. Rep. 152.

[5] Shaw v. Wallace, 25 N. J. L. 455, 14 M. R. 420.

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§ 1164. When an interest in the land conveyed by lease.— We have elsewhere seen that certain rights and advantages, notably that of assignment, apply when the lease conveys an interest in the land for the term, which do not always obtain otherwise. It therefore becomes important to inquire what leases do convey an interest in the land; thus, it has been held, both in England and in this country, that a lease of a right to mine coal is a grant of an interest in the land, and not a mere license to take coal.[1] This, it seems to us, is the true rule. It has both reason and the weight of authority to support it. At the common law, and under all the old English cases, it was considered well settled that a leasehold estate was an interest in land equivalent to a fee-simple for the period of its duration.[2] And in Virginia, a license whereby workmen were permitted to work in the mine was called a lease, but, because of its peculiar provisions, was held not to be assignable.[3] This we think is correct law, and we will discuss it further on in this work. The only difficulty in the proposition is that the court called that a lease which we would call a license. In Pennsylvania it has been called a chattel real;[4] and that court has also held that whatever else we might call a leasehold interest, oil leasehold interests and buildings on leaseholds are not "goods and effects."[5]

§ 1165. Distinction between lease and absolute sale of the product — Option to purchase.— There have been some leases so worded, doubtless for good reasons surrounding their execution, that they did not convey and did not attempt to convey any interest in the land, but only an interest in the coal, together with a right to mine it. Such leases

[1] Harlan v. Lehigh Coal Co., 35 Pa. St. 287, 8 M. R. 496; Carr v. Benson, L. R. 3 Ch. App. 524.

[2] Bl. Comm. 316, 317; Co. Litt. 42, 49; id. 172; Shep. Touch. 266, 268 *et seq.*

[3] Hodgson v. Parkins, 84 Va. 706, 5 S. E. Rep, 710, 16 M. R. 116.

[4] Titusville Works' Appeal, 77 Pa. St. 103, 9 M. R. 17.

[5] Vandergrift's and Foreman's Appeal, 83 Pa. St. 126, 9 M. R. 397. A mining lease is practically a sale of a portion of the land. Gowan v. Christie, L. R. 2 Sc. App. 273, 5 Moak, 114, 8 M. R. 688.

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have universally been held to work an absolute sale of the product of the mine taken out by the lessee but not to convey an interest in the land. For instance, a lease of certain lands provided that the lessee should have all the coal underlying the lands for the term of ninety-nine years, the lessees were to mine a minimum number of tons of coal per year and pay so much per ton therefor until all the available coal was removed, and the said minimum number of tons was to be paid for annually whether it was mined or not. It was held that this was an absolute sale of the coal conditioned upon its being removed.[1] And a lease and demise of all the coal in, upon and under certain land, or so much thereof as the lessee can take of the same within and during the period of twenty-five years, is a sale of the coal and not a license to raise it.[2]

So, in Missouri, an agreement in writing purported, in consideration of certain stipulated royalties, to lease land for mining only, and subject to the limitation that the grantee's rights should not be interfered with, reserving to the grantor the right of occupation for the purpose of cultivation, and providing also that it should remain in force until the minerals were exhausted, but otherwise it had no fixed term. It was held that the agreement was not a lease, since it had no determinate period, but that it passed title to all the minerals within the land subject to the claim of the owner for royalties.[3] Another instrument which received consideration by the Missouri supreme court purported to lease and convey all the coal in a certain tract of land for the period of twenty years, in consideration of a fixed sum per annum. The court held this to be a lease of all the coal the second party could mine during that period, and not an absolute sale of all the coal.[4] Of course it was

[1] In re Lazarus' Estate, 145 Pa. St. 1, 23 Atl. Rep. 372; Hope's Appeal, 3 Atl. Rep. 23.

[2] In re Hancock's Estate (Pa. Com. Pl.), 7 Kulp, 36.

[3] Hobart v. Murray, 54 Mo. App. 249.

[4] Austin v. Huntsville Coal & Mining Co., 72 Mo. 535, 9 M. R. 115.

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not an absolute sale of all the coal, but it would seem to us it was a sale conditioned upon removal within the prescribed period, rather than a lease. This is in harmony with the holding of the Pennsylvania court to the effect that a coal lease providing for a minimum annual rental until all the coal is mined is a contract for and sale of the coal conditionally upon the payment of the rent.[1]

Another provision in many mining leases or contracts which deserves and has received some attention by the courts is the clause giving the second party, or lessee, the option to purchase. It may be broadly stated that, unless expressly provided to the contrary in the instrument itself, this option must be exercised during the life of the lease or instrument creating it, and before forfeiture for failure by the lessee to keep any of his covenants. This question was considered by the supreme court of Canada, where a contract for the sale of phosphate mining rights provided that in case the purchaser, in working said mine, should find other minerals, he should have the privilege of buying the same for the price fixed by arbitrators. The purchaser worked the mine for a number of years and then discontinued it, and it was held that his option to purchase did not extend to other minerals not found while developing the phosphates.[2]

Article B.

Oil and Gas Leases — Special.

§ 1170. Oil and gas leases in general — Preliminary.
1171. Ownership of severed oil or gas.
1172. Qualified ownership, when — Rights as to pumping.
1173. Exclusive rights of lessee within described area.
1174. Ownership of the fluid.
1175. Instances of ownership by owner of soil — Not changed by severance.

[1] Lehigh Coal Co. v. Wright, 15 Pa. Co. Ct. Rep. 433, 7 Kulp, 434. See *post*, § 1177. See also Hancock's Estate (Pa. Com. Pl.), 7 Kulp, 86; *ante*, § 925.

[2] Baker v. McClelland, 24 Can. Sup. Ct. 416.

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§ 1176. Boundaries in oil leases.
1177. Name of contract immaterial.
1178. Rights and duties under oil leases — Some special cases.
1179. Covenant to commence operations and to test and work.
1180. Must prosecute work with diligence.
1181. More diligence required in oil and gas operations than in ordinary leases — When performance waived.
1182. Construction of contract by parties adopted — Surrendering a lease will not discharge liability to lessor.
1183. Must comply literally with contract — Parties entitled to what they bargain for.
1184. Effect of failure to execute by lessor's wife.
1185. Lease subject to former lease no waiver of objection thereto.
1186. Possession.
1187. Good faith required.
1188. Same — Operating at a loss.
1189. The doctrine of this article restated.

§ 1170. Oil and gas leases in general — Preliminary.— Since it is well settled that oil and gas *in situ* are both minerals and a part of the soil, in many respects the general doctrine of mining leases will apply to them. There are, however, a few special features peculiar to gas and oil leases, as enunciated by the courts, which require special notice. That oil and gas *in situ* are a part of the soil was at one time seriously disputed by the supreme court of Pennsylvania.[1] But elsewhere the doctrine is established by a long line of cases, of which we shall select only a few.[2] In correcting

[1] Dunham v. Kirkpatrick, 101 Pa. St. 43, probably overruled in Gill v. Weston, 110 Pa. St. 313.

[2] Brown v. Spillman, 155 U. S. 665; Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178; People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. Rep. 59; Columbian Oil Co. v. Blake, 13 Ind. App. 680; State v. Ind. & Ohio Gas & M. Co., 120 Ind. 575, 6 L. R. A. 579, 2 Interst. Com. 758; Hail v. Reed, 15 B. Mon. 479; Shepard v. McCalmont Oil Co., 38 Hun, 37; Hughes v. United Pipe Lines, 119 N. Y. 423; Kenton Gas & Electric Co. v. Dorney, 17 Ohio C. C. 101; Kier v. Peterson, 41 Pa. St. 561; Thompson v. Noble, 3 Pittsb. 201; Williamson v. Jones, 39 W. Va. 231; Hague v. Wheeler, 157 Pa. St. 324, 27 Atl. Rep. 719; Wood Co. P. Co. v. West Va. Trans. Co., 28 W. Va. 210; Wilson v. Youst, 43 W. Va. 826; Carter v. Tyler Co. Ct., 45 W. Va. 806, 32 S. E. Rep. 216; Murray v. Allard, 100 Tenn. 100, 43 S. W. Rep. 355; Atchison v. Stevenson, 146 Pa. St. 239.

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its former position and aligning itself with the other courts upon this question, the supreme court of Pennsylvania uses the following words: "Gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral, but it is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decisions. Water also is a mineral, but the decisions in ordinary cases of mining, etc., have never been held as unqualified precedents in regard to flowing or even percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturæ*. In common with aminals and unlike other minerals, they have the power and tendency to escape without the volition of their owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain. They belong to the owner of the land and are part of it, so long as they are on it or in it, and are subject to his control; but when they escape and go into other lands, or come under another's control, the title of the former owner is gone."[1]

§ 1171. Ownership of severed oil or gas.— The courts are somewhat at variance with each other as to the ownership of severed oil or gas. Obviously the rule is different in respect to both of them from what it would be generally with reference to water. *Prima facie*, since gas and oil are part of the soil, until the owner of the soil voluntarily parts with his title they are his property.[2] But at the same

[1] Westmoreland & C. Nat. Gas Co. v. De Witt, 120 Pa. St. 285, 18 Atl. Rep. 724, 5 L. R. A. 731. See also Brown v. Vandergrift, 80 Pa. St. 147, followed in Atchison v. Stevenson, 146 Pa. St. 239; Hague v. Wheeler, 157 Pa. St. 324; Brown v. Spillman, 155 U. S. 665; Ontario Nat. Gas Co. v. Gosfield, 18 Ont. App. 626.

[2] Hail v. Reed, 15 B. Mon. (Ky.) 479, 11 M. R. 103; Columbia Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 234.

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time, since the rule of percolating water applies to oil and gas, oil lawfully taken through the land of the taker is his property, even though it percolates from adjoining land.[1] There are a few cases supporting the doctrine that where the primary purpose of the well is to obtain oil, the incidental escapement of gas being unavoidable, the lessee may collect and use the same for his own purposes.[2] But, manifestly, he may not market it without paying the royalty required in the lease upon its value the same as oil.[3] And while oil and gas are generally spoken of together, the terms are obviously not synonymous. Following which principle, where land is leased to be worked for oil, with a provision that the lease shall be void within a certain time unless oil is found, the lease is not satisfied by finding gas within that time.[4]

§ 1172. Qualified ownership, when — Rights as to pumping.— It has recently been held that there is at least a qualified ownership of gas under the land sufficient upon which to base injunction proceedings against the exhaustion of the gas by pumping.[5] In this case the court said: "The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there."[6] It is well settled, by the better considered cases and a long line of

[1] Brown v. Vandergrift, 80 Pa. St. 147; Westmoreland & C. Nat. Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. Rep. 731; Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222; State v. Indiana & Ohio G. & M. Co., 120 Ind. 575, 6 L. R. A. 579; People's Gas Co. v. Tyner, 131 Ind. 277, 16 L. R. A. 433; Ohio Oil Co. v. Indiana, 177 U. S. 190.

[2] Wood County Petroleum Co. v. West Virginia Trans. Co., 28 W. Va. 210; Eaton v. Wilcox, 42 Hun, 61; Williamson v. Jones, *supra*.

[3] Taylor v. Peerless Ref. Co., 7 Ohio Dec. 368, 14 Ohio C. C. 315.

[4] Truby v. Palmer, 4 Cent. Rep. 925.

[5] Manufacturers' G. & O. Co. v. Ind. G. & O. Co., 155 Ind. 461, 57 N. E. Rep. 912.

[6] Id., citing (which see) Ohio Oil Co. v. Indiana, 177 U. S. 190, 213, 44 L. ed. 729, 740.

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decisions, that the common owners of the reservoir may prevent by injunction the taking by unnatural means, such as pumping.[1] But Pennsylvania stands squarely upon the ground that there is no ownership of oil until it is reduced to possession, and holds that where the defendant was using a pump to accelerate the production of oil on land adjoining that of plaintiff he might, for the reasons aboved stated, lawfully do so.[2]

§ 1173. Exclusive rights of lessee within described area.— It seems equally well settled that, from the nature of the enterprise, the right to bore for oil or gas within a given area is necessarily exclusive.[3] The supreme court of the United States, in illustrating the necessity of this rule, uses this language: "From the nature of gas and gas operations the grant of a well right is necessarily exclusive. It was so held in a Pennsylvania case,[4] although in that case the plaintiff had a mere license to enter, etc., and not, as here, a lease of the land. And it is exclusive in the present case over the whole tract. As already said, the clause relative to the three hundred yards distance was a restriction on the privilege granted, and not a reservation of any land or any boring rights to the lessor, and a well upon the prohibited portion was just as damaging to the lessees as

[1] Manufacturers' Nat. Gas Co. v. Ind. G. & O. Co., 155 Ind. 461, citing (which see) State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. Rep. 809; affirmed, Ohio Oil Co. v. Indiana, 177 U. S. 190; Jamison v. Ind. Nat. G. & O. Co., 128 Ind. 555, 28 N. E. Rep. 76; Townsend v. State, 147 Ind. 624, 47 N. E. Rep. 19. See also Tyner v. People's Gas Co., 131 Ind. 408, 31 N. E. Rep. 61.

[2] Jones v. Forest Oil Co., 194 Pa. St. 379, 44 Atl. Rep. 1074.

[3] Breckinridge v. Parrott, 15 Ind. App. 411, 44 N. E. Rep. 66; Edmunds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196; Kokomo Nat. Gas & Oil Co. v. Albright, 18 Ind. App. 151, 47 N. E. Rep. 682; Shephard v. McCalmont Oil Co., 38 Hun, 37; Woodland Oil Co. v. Crawford, 55 Ohio St. 16: Duffield v. Hue, 129 Pa. St. 94, 18 Atl. Rep. 566; Duke v. Hague, 107 Pa. St. 57; Brown v. Beecher, 120 Pa. St. 590: Kitchen v. Smith, 101 Pa. St. 542; Stoughton's Appeal, 88 Pa. St. 198; Funk v. Haldeman, 53 Pa. St. 229; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173.

[4] Funk v. Haldeman, 53 Pa. St. 229.

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upon any other portion of the tract. The drilling of the well threatened by the respondents is therefore in violation of the lease and should be enjoined."[1] But it has been held that an agreement giving the right to work lands for oil upon shares of the product brought to the surface gives no estate in the land or the mineral except an interest in such of the product as is really produced.[2] Under a statute in New York, oil and gas[3] leases are classed as personal property; but in Pennsylvania, under a statute, a leasehold mortgage is classed as real property.[4]

§ 1174. Ownership of the fluid.— Oil is different from water in one sense and identical with it in another. The water taken from the spring of another, for instance, when severed becomes the exclusive property of the person taking, assuming that the taking is in consequence of a license expressed or implied. Not so with oil. It has a distinctive value different from that of water; and even though it may be severed from the freehold, that is, drawn from the well or pipe, it is still the property of the owner of the soil from which it is taken until he shall have parted with the title. This, of course, upon the principle that it is drawn from his land against his will or surreptitiously. It is otherwise when it is taken pursuant to a license or lease by the terms of which the ownership is to pass to the lessee or licensee on payment of a rent or royalty.[5]

§ 1175. Instances of ownership by owner of soil — Not changed by severance.— Thus, oil discovered in a well sunk by the owner of the land is his exclusive property, whether

[1] Brown v. Spillman, 155 U. S. 665, 672, 673, quoting from Westmoreland & Cambria Nat. Gas Co.'s Appeal, 130 Pa. St. 235. See also Duffield v. Hue, 26 W. N. C. 387; s. c., 129 Pa. St. 94; Chicago & A. Oil & M. Co. v. United States Petroleum Co., 52 Pa. St. 83; Duffield v. Rosenweig, 144 Pa. St. 527.

[2] Thompson's Appeal, 101 Pa. St. 225.

[3] Willetts v. Brown, 42 Hun, 140.

[4] Gill v. Weston, 110 Pa. St. 313, 1 Atl. Rep. 921.

[5] Hail v. Reed (Ky.), 15 B. Mon. 479, 11 M. R. 103.

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drawn from an underground current of oil or found standing; and the case is not analogous to the surface owner's right in running streams of water.[1] The severance of the oil from the freehold does not divest the oil from the owner, nor deprive him of his right of immediate possession, nor prevent his recovery of the oil so taken by action of replevin, or its value, from one who took it from the well.[2]

§ 1176. Boundaries in oil leases.— Oil like water percolating through the earth's crust underneath the surface of the ground, its exact locality and subterranean boundaries are often matters of conjecture merely, seldom definitely known. It is customary in some parts of the country to insert in oil leases a provision for a protection strip of a limited number of feet around the surface boundaries, within which space the lessee or licensee may not bore for oil. In some of the states this is even regulated by statute. It will be unnecessary, however, to notice any of these statutes, because they are a subject of constant change, so that any reference to them would be of little value.

The rule, independent of statute, was commented on in Pennsylvania where a plaintiff and his grantors leased certain lands to the defendant, reserving a protection around the same, and the defendant, the lessee, in boring, encroached upon such protection strip by entering through the corner of the restricted area, which, apparently, was not expressly reserved. The court, in passing upon the rights of the parties, took occasion to say in very emphatic language that it was absurd to suppose that the parties to the contract containing the reservation intended to leave a gap at the corner of the reservation and thus defeat its purpose. It was accordingly held that the lessor was entitled to the same protection at the corners as at the sides of the reser-

[1] Hail v. Reed (Ky.), 15 B. Mon. 479, 11 M. R. 103; Dark v. Johnston, 55 Pa. St. 164; Wilson's Appeal, 77 Pa. St. 221.

[2] Hail v. Reed (Ky.), *supra;* Green v. Ashland Iron Co., 66 Pa. St. 97; Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 234; Koen v. Bartlett, 41 W. Va. 559, 23 S. E. Rep. 664.

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vation, and an injunction restraining defendants from interfering with the corner, or any portion of this tract, was granted.[1]

So it would seem that while a man has a right to do as he chooses with his own, the maxim which we have had occasion to advert to frequently, *sic utere tuo ut alienum non lædas*, steps in and compels obedience to its injunction, observing which, while he may bore for oil on his own lands, he has no right to draw the oil from the land of his neighbor by such means, and if the injury can be detected and proved it will be prevented.

§ 1177. Name of contract immaterial.— The name employed by the parties to the contract is immaterial. Any instrument which authorizes the boring for oil or gas for a compensation by way of rent or royalty will be construed as a lease, and gives the right accordingly.[2] But an agreement in the form of a lease has been held to be in effect a sale.[3]

§ 1178. Rights and duties under oil leases — Some special cases.— While the rights and duties of the parties under oil leases are not essentially different from those under any other, there have been a few circumstances worthy of notice, as where the lessee is bound to begin operations within a specified time or forfeit, and to pay a minimum royalty at all events. In the one case he will be bound to commence or the lessor will have the option to forfeit the lease, and in the other the minimum royalty must be paid.[4] So, where

[1] Allison & Evans' Appeal, 77 Pa. St. 221, 11 M. R. 142; Stewart's Appeal, 6 P. F. Smith, 413; Kleppner v. Lemon, 35 Atl. Rep. 109. See *ante*, § 1173; *post*, § 1630.

[2] Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. Rep. 1093, 34 L. R. A. 62; Chambers v. Smith, 183 Pa. St. 122, 36 Atl. Rep. 522; Chandler v. Pittsburg Plate Glass Co., 20 Ind. App. 165, 50 N. E. Rep. 400; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. Rep. 979; Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N. E. Rep. 502.

[3] Drunot's Estate, 29 Pittsb. Leg. J. 105; Wilson v. Youst, 43 W. Va. 826, 28 S. E. Rep. 781, 39 L. R. A. 292. But see *ante*, § 1165.

[4] Petroleum Co. v. Coal & Coke

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it was stipulated in a lease that the lessees should bore for oil, and that the lessor should retain possession for other purposes, and in the event that oil was not found, a rent should be paid for such period as the premises should be retained, although the lessees made no attempt to procure oil, and never took possession, they were liable for rent until they made a formal surrender of the right to operate for oil, and it was not sufficient that they tested surrounding land and found no oil vein therein.[1] But where a lease is made for a term of years, or so long as oil or gas is found in the premises, and it is provided that a special rental shall be paid during the term, and the gas or oil fails, or it becomes impracticable to use it, it has been held that the lessee is no longer responsible for minimum rent.[2]

§ 1179. Covenant to commence operations and to test and work.—The duration of the tenancy, notwithstanding some specified fixed period, as hereafter shown, is limited to actual operations. Whence it follows that the duty to commence and to test and bore for oil or gas, whether imposed as a covenant or expressed as a condition, generally operates as the latter, and the failure to test and work promptly avoids the lease at the option of the lessor.[3] But

Co., 89 Tenn. 381, 18 S. W. Rep. 65; Smith v. Munhall, 139 Pa. St. 253, 21 Atl. Rep. 735; Jamestown Co. v. Egbert, 152 Pa. St. 83, 25 Atl. Rep. 151; Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 234; Breckenridge v. Parrot, 44 N. E. Rep. 66; Edmonds v. Mounsey, 15 Ind. App. 299, 44 N. E. Rep. 196; Galey v. Kellerman, 123 Pa. St. 491.

[1] Jamestown Co. v. Egbert, *supra*. See also *post*, § 1187.

[2] Indianapolis Gas Co. v. Teters, 44 N. E. Rep. 549. See also Blair v. Northwestern Gas Co., 12 Ohio Cir. Ct. 78; Shellar v. Shivers, 171 Pa. St. 569, 33 Atl. Rep. 95; Double v. Union Heat & Light Co., 172 Pa. St. 388, 33 Atl. Rep. 694. See Stahl v. Van Vlecke, 53 Ohio St. 136, 41 N. E. Rep. 35; Coville v. Gilman, 13 W. Va. 314.

[3] Matthews v. People's Nat. Gas Co., 179 Pa. St. 165, 36 Atl. Rep. 216; Mississinewa M. Co. v. Andrews, 22 Ind. App. 523, 54 N. E. Rep. 146; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. Rep. 839, citing (*q. v.*) Guffey v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754; Mullin's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. Rep. 527; Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. Rep. 493; Bett-

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a lease providing for the drilling of one well in eight months and another one at a time not specified raises no presumption that wells are to be drilled as often as customary.[1]

§ 1180. Must prosecute work with diligence.— Since the purposes of the lease, so far as the rights of the lessor are concerned, are twofold, namely, the development of the land, and the reception of an income by way of rent and royalty, it is a manifest duty on the part of the lessee, whether expressed in the lease or not, to prosecute work, in the way of producing and marketing oil and gas, with reasonable diligence.[2] But the lessee who expends his own time and money in the enterprise has the right to exercise his own judgment as to the way he shall work, and no court

man v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. Rep. 220; McNish v. Stone, 15 Pa. St. 457; Whitcomb v. Hoyt, 30 Pa. St. 409; Brown v. Vandergrift, 80 Pa. St. 142; Duffield v. Hue, 129 Pa. St. 94, 18 Atl. Rep. 566; McKnight v. Mfg. Nat. Gas Co., 146 Pa. St. 185, 23 Atl. Rep. 164; Venture Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. Rep. 732; Cochran v. Pew, 159 Pa. St. 184; Barnhart v. Lockwood, 152 Pa. St. 82, 25 Atl. Rep. 237; Bartley v. Phillips, 165 Pa. St. 328, 30 Atl. Rep. 842; Western Pa. Gas Co. v. George, 161 Pa. St. 47; Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. Rep. 120; River Iron Co. v. Trout, 83 Va. 397, 2 S. E. Rep. 713; Oil Co. v. Kelley, 9 Ohio Cir. Ct. 511; Eaton v. Alleghany Gas Co., 122 N. Y. 416, 25 N. E. Rep. 981. See also Henderson v. Ferrell, 183 Pa. St. 547, 38 Atl. Rep. 1018; Stage v. Boyer, 183 Pa. St. 560, 38 Atl. Rep. 1035.

[1] Stoddard v. Emery, 128 Pa. St. 436, 18 Atl. Rep. 339.

[2] Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178, 181; Central Trust Co. of New York v. Berwind-White Coal Co., 95 Fed. Rep. 391; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. Rep. 839; Kokomo Nat. Gas & Oil Co. v. Albright, 47 N. E. Rep. 682; Bettman v. Shadle, 22 Ind. App. 543, 53 N. E. Rep. 662; Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 284; Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N. E. Rep. 502; Kunkle v. People's Nat. Gas Co., 165 Pa. St. 518; Gibson v. Oliver, 158 Pa. St. 277; Venture Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. Rep. 732; Jamestown & F. Ry. Co. v. Egbert, 153 Pa. St. 53; Aye v. Philadelphia Co., 193 Pa. St. 451, 44 Atl. Rep. 555; Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. Rep. 120; Fleming Oil & Gas Co. v. Southern Pennsylvania Oil Co., 37 W. Va. 645; Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271.

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has power to impose upon him the duty of accepting its judgment or that of any other person. So long as he acts in good faith he may act in the way that his business judgment dictates.[1]

§ 1181. More diligence required in oil and gas operations than in ordinary leases—When performance waived. In a well-reasoned case in the circuit court of appeals for the fourth circuit it is held that, oil and gas being the most uncertain, fluctuating, volatile and fugitive of minerals, a more rigid rule should be applied in the construction of such leases than in the case of ordinary minerals, and, unlike ordinary mining leases, they will be construed most strongly in favor of the lessor. And where a five years' lease provided for a well to be driven within ninety days, with a penalty of fifty dollars for failure to drive within that time, the only other compensation being a share of the proceeds derived from operating the well, the lessee having absolutely failed to begin operations within that period, it was held that, notwithstanding the tender by him of the fifty dollars, the lessor had the right to declare the lease forfeited; the fifty-dollar payment being construed as security for the performance of the conditions rather than as an alternative condition.[2]

In a later case from the same state (West Virginia), in the same court, where the lessee had partially but not entirely completed the driving of a well within the prescribed period, and the lessor had acquiesced in his operations, by boarding the men at work on the well and representing to the lessee that his action was satisfactory, it was held that the lessor had waived the right to claim a forfeiture, and a lease by him to a third party during such operations was invalid.[3]

[1] Colgan v. Forest Oil Co., 194 Pa. St. 234, 45 Atl. Rep. 119; Young v. Same, 194 Pa. St. 243, 45 Atl. Rep. 121.

[2] Huggins v. Daley, 99 Fed. Rep. 606. See also *post*, § 1187.

[3] Duffield v. Michaels (C. C. A.), 102 Fed. Rep. 820.

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§ 1182. Construction of contract by parties adopted — Surrendering a lease will not discharge liability to lessor. In Indiana in a late case the appellate court had occasion to pass upon a contract providing, *inter alia*, for the payment of $100 per annum rent if gas was found in paying quantities, for the commencement of work within a month, or the payment of $2 per day until work commenced or lease surrendered, and providing that lessee had the right to surrender and be released from all moneys due and conditions then unfulfilled, and that from that time the lease should be void and no longer binding on either party. On a default in payment, and after forfeiture on another point not necessary to the present inquiry, action was brought by the lessors for rent due, and thereupon the lessees, after suit, elected to surrender and did surrender the lease, and contended that that discharged them under the terms of the contract. The court, however, took a different view of the contract, and held that the agreement to commence work within a month or pay the $2 per day was absolute and independent of the right to surrender; and further, properly, we think, that the surrender could not be called a payment and was not so contemplated by the parties. In affirming the judgment the court calls to its aid many cases which appear in the note, and in its decision was controlled by the construction the parties themselves had by their actions adopted, and in the course of its reasoning says: "To adopt the construction for which counsel contend — that upon surrender all rentals are lost — is to say that some of the substantial provisions of the lease mean nothing. It contains a plain, unequivocal promise or covenant to begin a well at a certain time or pay a certain rental. . . . To adopt appellant's view is, in effect, to say there was no consideration for the contract; that it was not binding upon either party. The parties had acted upon it; had treated it as valid, and, while the conduct of the parties is not conclusive, yet it may be looked to in construing a contract that is ambiguous."

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We think the decision was right and that the intent of the parties could not have been given full effect by any other. Moreover, they had substantially construed it that way, and in such a case that ought to control.[1]

§ 1183. Must comply literally with contract — Parties entitled to what they bargain for.— It has been held that one undertaking to drill a gas well to a certain depth, and of a certain size, must comply literally with the contract, even though no gas be found, and a well of smaller bore is just as effective in determining that no gas can be found there at that depth.[2] In the principal case cited in the margin the court reasons that the parties were not merely bargaining for a test well, but likewise for a well of certain efficiency in output, and the lessor was not compelled to be satisfied with less than he bargained for.[3]

§ 1184. Effect of failure to execute by lessor's wife.— Where a wife of a lessor failed to join in the lease, but made no objection, and the lessee went into possession and operated the well for a considerable space of time without objection to the incomplete nature of the lease, it was held that the lessee could not set up this after-discovered fact to relieve it from payment for a benefit it had already received.[4]

[1] Bettman v. Shadle, 22 Ind. App. 543, 53 N. E. Rep. 662, citing (*q. v.*) Edmonds v. Mounsey, 15 Ind. App. 404, 44 N. E. Rep. 196; Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 234; Leatherman v. Oliver, 151 Pa. St. 646, 25 Atl. Rep. 309; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. Rep. 1093, 34 L. R. A. 62; Ogden v. Hatry, 145 Pa. St. 640, 23 Atl. Rep. 334; Galey v. Kellerman, 123 Pa. St. 491, 16 Atl. Rep. 474; Wills v. Mfg. Nat. Gas Co., 130 Pa. St. 222, 18 Atl. Rep. 721; Ray v. Western Pa. Gas Co., 138 Pa. St. 576, 20 Atl. Rep. 1065; Clark v. Jones, 1 Denio, 516. See also *post*, §§ 1228, 1229.

[2] Gillespie Tool Co. v. Wilson, 123 Pa. St. 19; 16 Am. & Eng. Encyc. Law (1st ed.), 223; 13 Cent. Law J. 503. See also Duffield v. Michaels, 102 Fed. Rep. 820; May v. Hazlewood Oil Co., 152 Pa. St. 518, 25 Atl. Rep. 564; Ohio Oil Co. v. Harris, 1 Ohio N. P. 132; Kleppner v. Lemon, 35 Atl. Rep. 109.

[3] Gillespie Tool Co. v. Wilson, 123 Pa. St. 19, 16 Atl. Rep. 36.

[4] Kunkle v. People's Nat. Gas Co., 165 Pa. St. 133, 33 L. R. A. 847. See Presidio M. Co. v. Bullis, 68 Tex. 581, 4 S. W. Rep. 860.

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§ 1185. Lease subject to former lease no waiver of objection thereto.—Where a lease was made to an oil and gas company "subject to an outstanding lease in J.," it was held that the taking of such lease in this form constituted no admission of the validity of the J. lease, and that the oil company had the right to insist upon and claim that the J. lease was in fact abandoned and forfeited, and that it had a good and valid lease notwithstanding those words, upon compliance with the terms of its own contract.[1]

§ 1186. Possession.— One who controls the gas — has it in his grasp, so to speak — is the one who has possession in the legal as well as in the ordinary sense of the word.[2] And courts of equity will not ordinarily interfere with such possession either by injunction or bill to quiet title.[3] But in all such cases affecting the right of possession, the courts will ordinarily refer the parties to their action in ejectment.[4] Where, however, a gas company is in possession and operating natural gas wells, the lessor may not interfere with such possession, and he will be restrained if he attempts to do so.[5]

§ 1187. Good faith required.—No mere perfunctory work will satisfy the law, nor will minimum rent or royalty in all cases be sufficient. The lessor is entitled to have the wells operated to the full reasonable capacity, or to receive as much rent or royalty as he would if they were operated with due diligence. The courts say the lessor is entitled to

[1] Elk Fork Oil & Gas Co. v. Jennings (C. C. W. Va.), 84 Fed. Rep. 839. See Schaupp v. Hukill, 34 W. Va. 375, 12 S. E. Rep. 501; Wolf v. Guffey, 161 Pa. St. 276, 28 Atl. Rep. 1117; Fennel v. Guffey, 28 Atl. Rep. 1118.

[2] Westmoreland & C. Nat. Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. Rep. 724, 5 L. R. A. 731; Mfg. Nat. Gas Co. v. Ind. Nat. Gas Co., 57 N. E. Rep. 912.

[3] Erskin v. Forest Oil Co., 80 Fed. Rep. 383; California Oil & Gas Co. v. Miller, 96 Fed. Rep. 12.

[4] Messimer's Appeal, 92 Pa. St. 169; Long's Appeal, id. 179; Coal Co. v. Snowden, 42 Pa. St. 488; Glonninger v. Hazard, id. 389; Erskin v. Forest Oil Co., *supra*.

[5] Citizens' Nat. Gas Co. v. Shanango Nat. Gas Co., 138 Pa. St. 22; 20 Atl. Rep. 947.

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a literal performance of the lease in the form it is written.[1] The covenants of the parties, being for wells on the premises, manifestly cannot be satisfied by boring on adjoining premises, not even though it becomes apparent by tests made on neighboring premises that the leased territory does not contain oil or gas. Their covenant is to bore, and they are not relieved from the obligation to do so.[2]

§ 1188. Same — Operating at a loss.— The question as to whether the lessee must operate at a loss depends very much upon the language of the covenant. Independent of that, the covenant to operate with due diligence has been held to imply no requirement to operate without profit, and that a covenant to prosecute the business of boring for oil with due diligence, in a lease reserving a royalty to the lessor, only imposes upon the lessee the obligation to prosecute the business to the extent that it can reasonably be done and leave him a profit.[3] And it seems that the general rule would only forfeit the lease in such case for failure to so operate.[4]

§ 1189. The doctrine of this article restated.— The law governing oil and gas leases seems reasonably well settled by the courts, and from a careful collection of the same, in the foregoing pages, we are authorized to extract

[1] Pearce v. Bridgewater Gas Co., 28 Pittsb. Leg. J. 171; Wichman v. Fort Orange Oil Co., 6 Ohio Dec. 540; Western Pa. Gas Co. v. George, 161 Pa. St. 47; Aye v. Philadelphia Co., 193 Pa. St. 457, 44 Atl. Rep. 555.

[2] *Ante*, § 1181; Gibson v. Oliver, 158 Pa. St. 277; Springer v. Citizens' Nat. Gas Co., 145 Pa. St. 480, 22 Atl. Rep. 986; Bradford Oil Co. v. Blair, 113 Pa. St. 83; Jamestown & F. Ry. Co. v. Egbert, 152 Pa. St. 53; Pearce v. Bridgewater Oil & Gas Co., *supra;* Young v. Equitable Gas Co., 28 Pittsb. Leg. J. 75; and see *ante*, § 1178.

[3] Bradford Oil Co. v. Blair, 113 Pa. St. 83, 4 Atl. Rep. 218; Young v. Forest Oil Co., 45 Atl. Rep. 121; McKnight v. Mfg. Nat. Gas Co., 146 Pa. St. 185. In the last case danger to the well excused operations.

[4] Glasgow v. Chartiers Oil Co., 152 Pa. St. 48, affirming Glasgow v. Griffiths, 22 Pittsb. Leg. J. (N. S.) 181; Snodgrass v. So. Pa. Oil Co. (W. Va.), 35 S. E. Rep. 820.

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the following conclusions: Gas and oil are minerals, and when *in situ* are a part of the realty. Respecting severance of oil or gas, however, and after it has become personal property, if the oil was taken lawfully it is the property of the taker, otherwise it is the property of the owner of the soil until he lawfully parts with it. And this ownership of the gas beneath the surface is sufficient upon which to base an injunction preventing its removal by pumping. In all leases of oil or gas there is always provided, and if not provided the custom is so strong that it is implied, the duty of leaving a protection strip about the well. The reason of this is plain, namely, to prevent encroachments from neighboring borers, and from these principles respecting the boring for oil or gas, it is settled that the maxim, so use your own as not to injure others, is rigidly enforced. The general rule is that land is leased for oil or gas with the expectation that due diligence, at least, will be exercised in prosecuting the work, and that the lessees will be liable, in many cases, for a minimum rent if they do not. But this latter proposition is controlled largely by the lease itself and the terms of the covenants. And while the lessor is entitle to a literal performance, there is no implied covenant that the lessee will operate at a loss. Honest effort to obtain oil or gas is in general all that will be exacted, and in the absence of any other stipulated penalty, that of forfeiture of the lease is all that can be exacted.

ARTICLE C.

Duration of Tenancy, Termination, Forfeiture and Re-entry.

§ 1200. When lease operates as a severance, when for a term merely.
1201. Same subject — Present demise, renewal.
1202. Distinction between lease and sale of the product — Intention of parties.
1203. Agreement for lease construed as a lease.
1204. Re-entry generally.
1205. Actual re-entry, when necessary — Forfeiture, when question of fact.

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§ 1206. When duration to exhaustion of mine — When lessee takes chances as to minerals.
1207. Exhaustion of mine — Money rent after exhaustion.
1208. A distinction.
1209. Doctrine opposed to taking chances as to minerals — Existence presumed sometimes.
1210. Reasonable diligence — Constant work not necessary.
1211. Same — Diligence defined — Question of law.
1212. Oil and gas leases — Duration of tenancy.
1213. Net proceeds — Profits.
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1215. Extent of lessee's liability.
1216. Extreme doctrine — Tenancy from year to year.
1217. Lessor prohibited from mining during exclusive lease for time certain.
1218. Not terminated by mere cessation — Lessee must notify lessor.
1219. Modification by parol.
1220. May not arbitrarily refuse to mine.
1221. Lessee not bound to resort to shooting well.
1222. Abandonment and surrender of the lease and forfeiture.
1223. Same — Right to abandon.
1224. Must pay royalty until surrender of leased premises.
1225. Recovery of possession — Eviction — Grantee's right to rents.
1226. Forfeiture of the lease.
1227. Forfeiture in general — For mere non-payment redeemable.
1228. Forfeiture clause not self-executing.
1229. Voidable only at option of lessor — Time of performance — Question of fact.
1230. Forfeiture under statutes — Likewise of statutes making leases irrevocable.
1231. When a tenancy at will.
1232. Renewals — The general rule.
1233. Lease construed as an entirety — General consideration supports covenant of renewal.
1234. When a perpetual renewal.
1235. Further as to forfeiture — Special circumstances — Election to terminate held unnecessary.
1236. Enforcing forfeiture clause — Waiver.
1237. Gas not embraced in oil lease — Boring after forfeiture.
1238. Abandonment — When permitted.
1239. Notice in general — When necessary.
1240. Forfeiture — Where burden rests — What is.
1241. Intent is controlling.
1242. Tenancy — When terminated — General duties and liabilities.
1243. Summary — The doctrine of this article restated.

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§ 1200. When lease operates as a severance, when for a term merely.— What has elsewhere been said with reference to the general doctrine of severance applies equally here, the general rule being that, where a particular vein of coal or ore is granted, it operates as a severance of that vein from the other estate. It may be generally said that in all other cases, with rare exceptions, the lease operates as a demise for a term merely.[1] But authority is not wanting for the proposition that the duration of tenancy is sometimes a question of fact for the jury.[2]

§ 1201. Same subject — Present demise, renewal.— The authorities are uniform on the proposition that there must be a present demise to save the instrument from being construed as an agreement for a future lease. Likewise, a present right of entry for a fixed period and definite as to when the right of entry shall begin.[3] The duration of the tenancy should also be certainly provided in order to avoid the operation of the rule rendering it nugatory for uncertainty.[4]

§ 1202. Distinction between lease and sale of the product — Intention of parties.— We have previously intimated that there is considerable diversity of opinion as to what particular name courts see fit to bestow upon particu-

[1] McDowell v. Hendrix, 67 Ind. 513; Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. Rep. 11; Shaw v. Stenton, 2 H. & N. 858; Henry v. Owings, 6 Gill, 191; Talbot v. Ford, 3 Sim. 173; Butte v. Thompson, 13 M. & W. 487. A lease has been held to be a "disposition," within the meaning of a contract terminating upon a sale or disposition of the property. Hill v. Sumner, 132 U. S. 118. But see Ober v. Schenck (Utah), 65 Pac. Rep. 1073.

[2] Horner v. Leeds, 25 N. J. L. 106.

[3] Kemble Coal Co. v. Scott, 90 Pa. St. 332; McElwaine v. Brown (Pa.), 9 Cent. Rep. 789, 11 Atl. Rep. 453; Paul v. Cragnas (Nev.), 59 Pac. Rep. 857; Burr v. Spencer, 36 Conn. 159; Wilson v. Phillips, 2 Bing. 16; Tobey v. Thomas, 39 Wis. 317; Clegg v. Jones, 93 id. 482; Morgan v. Bissell, 3 Taunt. 65.

[4] Paul v. Cragnas, *supra*.

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lar instruments. These distinctions have been more subtle than useful, and the conclusion is justified that the courts have the power to bestow upon them whatever name they choose; and the principal thing after all is as to what is the intention of the parties, rather than what name shall be applied. A striking illustration of this truth is found in a recent ably-considered case in New York. The instrument in question was characterized by the parties as a "memorandum of agreement," which might mean almost anything. It provided that the first party "leased" to the second party "all the coal contained in or under" certain land, but provided further that should any of the coal not prove of merchantable quality, or should it be impracticable, by reason of extraordinary expense, to mine the same, or should the veins prove of such character or thickness as to make it more expensive to mine them than other mines of the second party in the neighborhood, then the liability of the second party to take and pay for the coal should cease. There was a further provision to the effect that at all events only such coal as would pass over a half-inch screen should be subject to royalty; that should a "fault" be encountered by the second party in operating the property, it should not be obliged to expend a greater sum than five hundred dollars to remove it, before being entitled to abandon. The second party agreed to pay a certain royalty per ton on all coal mined, and a minimum royalty at all events; this latter to cease, however, upon the coal vein becoming sufficiently exhausted that it could not be safely and economically mined. The defendant worked under this contract to the extent of mining the coal from under some seventy-five acres, a portion of the work having been, according to the complaint, so negligently conducted as to cause a "squeeze" in the shaft, after which no work was done. The defendant contended that this instrument amounted to a sale of the coal, and that the most plaintiff could claim was the minimum rent, which had never been withheld. The court of appeals, however, speaking through

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Finch, J.,[1] refused to adopt this theory, but gave it the construction which he thought the parties intended it should have, and held it to be an executory contract, under which the defendant was bound to perform work, the payment of minimum rent being insufficient. And further, that there was an implied promise on the part of the defendant not to wilfully incapacitate itself from performing such work by allowing the mine shaft to "squeeze," thus rendering further operations impossible. In the course of the opinion its author took occasion to refer to several Pennsylvania decisions upholding this position that, in order to entitle an instrument to be construed as an absolute sale of the product, the thing sold must be such that it can be identified as land.[2] This is hardly in harmony with the Missouri case[3] and the Pennsylvania case[4] previously referred to, where the instrument was held to be a sale of the coal. The strongest feature in this case, as we view it, is the desire expressed, and followed by the court, to give the instrument the construction, if possible, which the parties intended it should have, and this should be the principal question for adjudication in all such matters, the name given the particular instrument being of minor importance.

§ 1203. Agreement for lease construed as a lease.— Where there was an agreement, purporting on its face to be an agreement for a lease to commence in the future, but under it the provisional lessee went into possession and so

[1] Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 32 N. E. Rep. 1078, 19 L. R. A. 127, citing with approval King v. Bedworth, 8 East, 387; Jefferys v. Fairs, L. R. 4 Ch. Div. 448, and overruling in part Genet v. Canal Co., 48 N. Y. S. 589.

[2] Caldwell v. Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Caldwell v. Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Armstrong v. Caldwell, 53 Pa. St. 284; Scranton v. Phillips, 94 Pa. St. 15; Sanderson v. Scranton, 105 Pa. St. 469; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. St. 588; Fairchild v. Fairchild (Pa. Sup.), 9 Atl. Rep. 255; Montooth v. Gamble, 123 Pa. St. 240; Kingsley v. Hillside Coal & Iron Co., 144 Pa. St. 613; Lazarus' Estate, 145 Pa. St. 1.

[3] Hobart v. Murray, 54 Mo. App. 249; *ante*, § 1165, note 3, p. 952.

[4] Id., note 1, p. 953.

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remained, and expended large sums of money, returning and paying rent in accordance with the contract itself, it was held to be a lease and not an agreement for a future lease.[1] So, accepting an unexecuted lease was held to be equivalent to a lease itself, duly executed.[2]

§ 1204. Re-entry generally.— Obviously, the right of re-entry is accomplished for breach by a provision that the lease shall absolutely cease and determine and become void to all intents and purposes, at the option of the lessor, upon the occurrence of the breach of a forfeiture-bearing covenant.[3]

§ 1205. Actual re-entry, when necessary — Forfeiture, when question of fact.— It is not absolutely necessary, under the provisos of re-entry, that there should be an actual re-entry by the lessor, to put an end to the lease.[4] But where the landlord has reserved the right to re-enter for arrears, and there is a sheriff's sale of the leasehold interest, the law discharges the right of re-entry and substitutes for it the payment of arrears out of the proceeds.[5] As to whether a forfeiture can be declared depends very much upon the language of the instrument. Sometimes it is a question of law[6] and sometimes a question of fact,[7] depend-

[1] Chicago & Allegheny M. & M. Co. v. United States Petroleum Co., 57 Pa. St. 83. See also Turner v. Reynolds, 23 Pa. St. 199.

[2] Chamberlain v. Parker, 45 N. Y. 569.

[3] Bainb. Mines, p. 215; Bowser v. Colby, 1 Hare, 109, 11 L. J. (N. S.) 132; Bracebridge v. Buckley, 2 Prince, 200; Hill v. Barclay, 16 Ves. 402; Webber v. Smith, 2 Vern. 103; Rolfe v. Harris, 2 Price, 206; White v. Warner, 2 Mer. 459; Greene v. Bridges, 4 Sim. 96; Thompson v. Guyon, 5 Sim. 6; Lovat v. Lord Ranelaigh, 3 Ves. & B. 24; Wadman v. Calcraft, 10 Ves. 67; Kirk v. Mattier, 41 S. W. Rep. 252, 140 Mo. 23; Boys v. Robinson (N. J.), 38 Atl. Rep. 813: Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. Rep. 970; Mickle v. Douglass, 75 Iowa, 78, 39 N. W. Rep. 198; Sunday Lake M. Co. v. Wakefield, 72 Wis. 204, 39 N. W. Rep. 136; Woodward v. Mitchell, 140 Ind. 406, 39 N. E. Rep. 437; Vanatta v. Brewer, 32 N. J. Eq. 268.

[4] Shaffer v. Shaffer, 87 Pa. St. 535; Davis v. Moss, 38 id. 346.

[5] Wood's Appeal, 30 Pa. St. 274.

[6] Patterson v. Silliman, 28 Pa. St. 304.

[7] Beatty v. Gregory, 17 Iowa, 109.

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ing, of course, upon the surrounding circumstances and the language of the instrument.

§ 1206. When duration to exhaustion of mine — When lessee takes chances as to minerals.— If the lease provides for a demise of a certain vein, bed or lode within certain limits and has no other limitation or expression as to time, it is absolutely certain that the lease is limited only to the exhaustion of the product.[1] But, obviously, even in the absence of covenants, the lessees would be required to operate with reasonable diligence.[2] It is a settled rule, in the absence of express warranty to the contrary, that the lessee take chances as to the premises containing minerals.[3]

§ 1207. Exhaustion of mine — Money rent after exhaustion.— Under a lease of coal lands providing for a certain rental per year, and also that the payments should cease "after the stone coal under said lands shall be fully taken out, and said mines exhausted according to the practical methods of coal mining," the lessee cannot escape responsibility upon the ground that the coal is so situated that it cannot be extracted or mined except at unusual or extraordinary cost.[4]

[1] *Ante*, §§ 1181, 1187. See also Walker v. Tucker, 70 Ill. 527; Sunnyside C. & C. Co. v. Reitz, 14 Ind. App. 478; Genet v. Delaware & H. Canal Co., 136 N. Y. 593, 32 N. E. Rep. 1078; Todd v. Stambaugh, 37 Ohio St. 520; Trout v. McDonald, 83 Pa. St. 144; McCahan v. Wharton, 121 Pa. St. 424, 15 Atl. Rep. 615; Shenandoah L. & A. Co. v. Hise, 92 Va. 238, 23 S. E. Rep. 303; Gowan v. Christie, L. R. 2 Sc. App. 273; Smith v. Morris, 2 Brown C. C. 311.

[2] Jegon v. Vivian, L. R. 6 Ch. App. 742; Lord Abinger v. Ashton, L. R. 17 Eq. 358. See also *ante*, § 1202.

[3] Gowan v. Christie, *supra;* Beattie v. Rocky Branch Coal Co., 56 Mo. App. 221; Brainard v. Arnold, 27 Conn. 617; Bamford v. Lehigh Z. & I. Co., 33 Fed. Rep. 677; Clifton v. Montague, 40 W. Va. 207, 33 L. R. A. 439; Harlan v. Lehigh C. Co., 35 Pa. St. 287.

[4] Beattie v. Rocky Branch Coal Co., 56 Mo. App. 221. Supporting the same doctrine, see Phillips v. Jones, 9 Sim. 519; Pierce v. Tidwell (Ala.), 2 S. Rep. 15; Marquis of Bute v. Thompson, 13 M. & W. 487.

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§ 1208. A distinction.— But in Illinois it was held that there was a distinction between an absolute inability to perform on the ground of impossibility, and an unwillingness to perform, and looking at the lease in that light the court would not enforce it.[1]

§ 1209. Doctrine opposed to taking chances as to minerals — Existence presumed sometimes.— A lease of land for the purpose of exploring for and taking out marketable iron ore presupposes, it is said by some courts, the existence of such ore, and where none is discovered of sufficient value to justify marketing by the lessee, after due and reasonable diligence, he is not bound to pay the rent specified in such lease.[2] So, where the lease was qualified in its requirements by the words "fairly workable" and no such coal was found, the lessee was excused.[3]

§ 1210. Reasonable diligence — Constant work not necessary.— It should be apparent to one giving the matter anything like careful consideration that a covenant to do the work in a workmanlike manner, or with reasonable diligence, does not imply that the lessee will be always working. Of course, as pointed out in a celebrated case,[4] there are several ways of accomplishing this purpose. As, for instance, to provide for so heavy a dead rent that it will be to the advantage of the lessee to keep constantly at work; or to provide for the raising of a certain number of tons annually. Either or both of these, or similar covenants, are perfectly proper to be inserted in a lease, but they will not be implied. As aptly said by Lord Hatherly in the case just

[1] Walker v. Tucker, 70 Ill. 527. See also Smith v. Morris, 2 Brown C. C. 311.

[2] Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. Rep. 427; Cook v. Anderson, 36 Ohio St. 174.

[3] Jones v. Shears, 7 C. & P. 346, 32 Eng. C. L. Rep. 649. See also Newton v. Nock, 43 L. T. (N. S.) 197; Smith v. Morris, 2 Brown C. C. 311; Furnival v. Crew, 3 Atk. Rep. 83; Garman v. Potts, 135 Pa. St. 506, 19 Atl. Rep. 1071.

[4] Jegon v. Vivian, L. R. 6 Ch. App. 742. See also Lord Abinger v. Ashton, L. R. 17 Eq. 358, 9 Moak's Eng. Rep. 585. As to covenant for renewal, see *post*, § 1232.

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cited: "If the parties meant the lessee to work continuously, they ought to have said so."

§ 1211. Same — Diligence defined — Question of law. — In an early Nevada case, the question of due or reasonable diligence, as applied to the appropriation of water for mining, which would be the rule in any case, was carefully considered by Lewis, C. J., who concluded that diligence is sufficiently clearly defined to enable courts to determine whether any given state of facts is sufficient to constitute it; that, while the jury are the sole judges of the facts, it is entirely within the province of the court to set aside a verdict that due diligence has been exercised, where the evidence is not sufficient, as a matter of law, to support it.[1] In the course of the opinion the court held that, while diligence is defined as the "steady application to business of any kind, constant effort to accomplish any undertaking," the law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable; that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. The facts in this case were held not to constitute reasonable diligence as thus defined, and the verdict of the jury was ordered set aside.

§ 1212. Oil and gas leases — Duration of tenancy. — While it seems to be the common practice to provide in oil and gas leases for a fixed period of tenancy, "or as long as gas and oil can be found in paying quantities," or words equivalent thereto, yet the failure to bore at all within the fixed period will not excuse the payment of a minimum royalty or dead rent; in other words, minimum royalty or dead rent is the controlling feature of all such contracts.[2] And in

[1] Ophir Silver M. Co. v. Carpenter, 4 Nev. 534.

[2] Rice v. Ege, 42 Fed. Rep. 661; Central Trust Co. of New York v. Berwind-White Coal Co., 95 Fed. Rep. 391; Pierce v. Tidwell, 81 Ala. 299, 2 S. Rep. 15; Indianapolis Nat. Gas Co. v. Teters, 15 Ind. App. 475, 44 N. E. Rep. 549; Bettman v. Shadle, 22 Ind. 542, 53 N. E. Rep.

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such case it is a tenancy for the fixed period.[1] And the lessee must pay for that period whether actually worked or not.[2]

§ 1213. Net proceeds — Profits.— Where the lessee agrees to pay the lessor one-third, or any other portion, of the profits realized from the sale of all oil or gas found on the premises, the word "profits" does not mean the gross output, but only the net amount realized after deducting expenses.[3] In western mining leases, the term "net proceeds" generally means the proceeds derived from sale of the ore after deducting freight, assaying, smelting and treatment charges only; the cost of mining and bringing the ore to the surface being borne by the lessee.

§ 1214. Failure to find oil makes fixed period.— In an Ohio case where the lease was for a fixed period, and as much longer as oil or gas was found or produced in paying quantities thereon, at a fixed rental, the court said: "Upon

663; Kokomo Nat. Gas & Oil Co. v. Albright, 18 Ind. App. 151, 47 N. E. Rep. 682; Evans v. Consumers' Gas Trust Co., 29 N. E. Rep. 398, 31 L. R. A. 673; Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 182, 52 N. E. Rep. 168; Bell v. Truit, 9 Bush, 257; Richardson v. Downs (Ky.), 16 S. W. Rep. 84; Eaton v. Alleghany Gas Co., 122 N. Y. 416, 25 N. E. Rep. 981; Ohio Oil Co. v. Lane, 59 Ohio St. 307, 52 N. E. Rep. 791; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. Rep. 1093, 34 L. R. A. 62; Northwestern Ohio Nat. Gas Co. v. City of Tiffin, 54 N. E. Rep. 77; Hankey v. Kramp, 12 Ohio C. C. 95; Collins v. Mechling (Pa.), 38 W. N. C. 235; Young v. Equitable Gas Co., 28 Pittsb. L. J. (N. S.) 75, 41 W. N. C. 24; Swint v. McCalmont Oil Co., 184 Pa. St. 202; Jackson v. O'Hara, 183 Pa. St. 283, 38 Atl. Rep. 624; Williams v. Guffey, 178 Pa. St. 342, 35 Atl. Rep. 875; McConnell v. Lawrence Nat. Gas Co., 30 Pittsb. L. J. 346; Matthews v. People's Nat. Gas Co., 179 Pa. St. 165, 36 Atl. Rep. 216; Balfour v. Russell, 67 Pa. St. 287; Lynch v. Versailles Fuel Gas Co., 165 Pa. St. 18; Double v. Union H. & L. Co., 172 Pa. St. 388; Roberts v. Bettman, 45 W. Va. 143, 30 S. E. Rep. 95; Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271, 36 L. R. A. 566.

[1] See last preceding note. Compare Cassel v. Crowther, 193 Pa. St. 359, 44 Atl. Rep. 446.

[2] Williams v. Guffey, 178 Pa. St. 342, 35 Atl. Rep. 875.

[3] Poterie Gas Co. v. Poterie, 179 Pa. St. 68, 36 Atl. Rep. 232; Aiken v. Marshall Oil Co., 188 Pa. St. 614, 41 Atl. Rep. 748.

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payment of the rental his right to complete the well continued for the specified term of five years, but no longer; and if within that time oil or gas was produced in paying quantities, then the lease was to continue as long as the product should prove profitable; but if neither of those articles was so produced within the specified time the lease was at an end."[1] And this notwithstanding the implied covenant that the property shall be operated and fully developed.[2] But of course diligence and good faith would be required in making such developments.

§ 1215. Extent of lessee's liability.— In an Ohio case where a certain number of wells drilled gave the lessee a right to include in his lease an entire tract of land, it was held that the lessee was not liable for rent on additional wells over the number giving him the right, even though the rent was at a certain rate per well,[3] for the reason that the stipulated maximum was all the lessor was entitled to, thus overruling the trial court.[4] The lessee is not liable for royalties after operations have ceased;[5] and payment by one, where there is a joint liability, is sufficient as a matter of course, since one discharge of an obligation is all any person is entitled to.[6] But where the title is dependent upon payment of rent, it follows that where none is paid the lessee has no title — nothing but a bare license to prospect.[7]

§ 1216. Extreme doctrine — Tenancy from year to year. In Indiana, where an instrument provided that the tenancy

[1] Northwestern Ohio Nat. Gas Co. v. City of Tiffin, 54 N. E. Rep. 77. To same effect, see Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271, 36 L. R. A. 566.

[2] McKnight v. Mfg. Nat. Gas Co., 146 Pa. St. 185; Bradford Oil Co. v. Blair, 113 Pa. St. 83, 4 Atl. Rep. 218; Ohio Oil Co. v. Kelley, 9 Ohio Cir. Ct. 511.

[3] Fort Orange Oil Co. v. Wichman, 17 Ohio Cir. Ct. Rep. 57.

[4] Wichman v. Fort Orange Oil Co., 4 Ohio N. P. 407. See same case, 17 Ohio Cir. Ct. Rep. 57. See also note 7, *infra*.

[5] Williams v. Guffey, 178 Pa. St. 372, 37 Atl. Rep. 875.

[6] Swint v. McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. Rep. 121.

[7] Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. Rep. 978; Venture Oil Co. v. Fretts, 152 Pa. St. 451.

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should begin at once, but said nothing as to the period of its duration, except that it should terminate whenever natural gas should cease to be used generally for manufacturing purposes in Howard county, or upon failure of lessee to pay rent within sixty days after it became due, which was on the first of each January, the court of appeals construed this to be a lease from year to year.[1] This is substantially the ruling of the supreme court of North Carolina.[2]

§ 1217. Lessor prohibited from mining during exclusive lease for time certain.— In an early case in the United States court for the western district of Pennsylvania,[3] the court had under consideration a lease for the sole and only purpose of mining and excavating for petroleum, etc., for the period of twenty-five years for a stipulated royalty, subject to the lessor's use of the same for tillage, the lessee to commence operations within a specified time. The court held that, notwithstanding the fact that the lessee had not commenced operations within the time limited, the lessor had no right to mine in the premises or lease them to others for that purpose, his remedy being against the lessee for failure to commence operations. There was no forfeiture-bearing covenant in the lease for failure to work, and therefore, perhaps, the decision was correct, though it is certainly a harsh rule. In the Michigan case,[4] it will be remembered, the lease was of an undivided interest, and in a suit by the assigns of the lessee to determine the rights of the parties, this was held not exclusive.

§ 1218. Not terminated by mere cessation—Lessee must notify lessor.— A mining lease for two years providing that if gas and oil be found in paying quantities it shall be extended, and that should any well produce gas in sufficient

[1] Diamond Plate Glass Co. v. Curless, 22 Ind. App. 346, 52 N. E. Rep. 781.

[2] Doe v. Axley, 5 Jones (50 N. C.), 440.

[3] Barker v. Dale, 8 Pittsb. L. J. 190, 2 Fed. Cas. 810, No. 988. See also *post*, § 1292.

[4] Harlow v. Lake Superior Iron Co., 36 Mich. 105; *ante*, § 1155, note 1, p. 944.

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quantities to justify marketing, the lessee should pay two hundred dollars per year for such well so long as gas therefrom was sold, is not terminated by mere cessation of operations a month after the expiration of the fixed term; but it is the lessee's duty to notify the lessor that the well has ceased to produce gas in paying quantities, and a consequent termination of the lease.[1]

§ 1219. **Modification by parol.**— Where a written lease of land for the production of petroleum and natural gas contains a covenant whereby the lessor agrees to extend the lease from year to year so long as the production continues, and provides for a specified royalty, it may be modified by parol so as to relieve the lessee from payment of royalty.[2] This, amounting to nothing more than a waiver, should be the rule in any case.

§ 1220. **May not arbitrarily refuse to mine.**— The clause in coal or oil leases that royalties are to be paid only so long as the product is mined in paying quantities is inserted as a protection in case of exhaustion, and to prevent an obligation to pay thereafter, but it does not relieve the lessee if he wilfully and arbitrarily refuses to mine or bore.[3]

§ 1221. **Lessee not bound to resort to shooting well.**— Where the explorations show a series of dry holes, the lessee is not bound to resort to the experiment of shooting the well with nitro-glycerine or other explosives, even though that sometimes produces oil or gas, where, in the particular case, there is no evidence that it will do so.[4] In other words, reasonable diligence is all that is required.[5]

[1] Double v. Union Heat & Light Co., 172 Pa. St. 388, 33 Atl. Rep. 694. To same effect, see Iams v. Carnegie Nat. Gas Co., 194 Pa. St. 72, 45 Atl. Rep. 54. Compare Barnhart v. Lockwood, 152 Pa. St. 82.

[2] Crawford v. Bellevue & G. Nat. Gas Co., 183 Pa. St. 227, 38 Atl. Rep. 595.

[3] Central Trust Co. of New York v. Berwind-White Coal Co., 95 Fed. Rep. 391; Young v. Forest Oil Co., 194 Pa. St. 243; Jones v. Western Pa. Gas Co., 23 Atl. Rep. 386.

[4] Rice v. Ege, 42 Fed. Rep. 661. See also Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178, 181.

[5] See *ante*, § 1211.

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§ 1222. Abandonment and surrender of the lease and forfeiture.— Some courts say that from the precarious nature of the undertaking proceeds generally the right to abandon the lease in case it should prove unprofitable.[1] This right to abandon is sometimes held to exist in the lessee; but manifestly he cannot take advantage of his own laches, nor can he evade the payment of earned rents or royalties by the unseasonable or improper attempt to abandon.[2]

§ 1223. Same — Right to abandon.— Concerning the right to abandon a lease, the circuit court of appeals for the fourth circuit, in a case appealed from the district of West Virginia, says: "The agreement to dig one well within one year secures the prompt beginning of these operations. The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants. The consideration, therefore, for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and voidable at the pleasure of either."[3]

The Pennsylvania court says: "A lessee who has acquired leasehold rights in oil and gas lands for the purpose of operating for oil has the right to remove his machinery from the leased premises under an express covenant to that effect, irrespective of any question as to whether there is a legal

[1] Indianapolis Gas Co. v. Teters, 15 Ind. App. 475; Glasgow v. Chartiers Valley Oil Co., 152 Pa. St. 48. See *post*, §§ 1238–39. But see *ante*, § 1171.

[2] Doe v. Bancks, 4 B. & Ald. 401; Roberts v. Davey, id. 664; Evans v. Consumers' Gas Trust Co. (Ind.), 29 N. E. Rep. 323, 31 L. R. A. 673; Wills v. Mfg. Nat. Gas Co., 130 Pa. St. 222, 5 L. R. A. 603; Galey v. Kellerman, 123 Pa. St. 491; Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271. And see *ante*, § 1182.

[3] Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178, citing Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. Rep. 120; Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. Rep. 65; Colgan v. Forest Oil Co., 194 Pa. St. 243. See Leatherman v. Oliver, 151 Pa. St. 646; Aderhold v. Oil Well Supply Co., 158 Pa. St. 401, 28 Atl. Rep. 22.

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right to abandon the lease by reason of an alleged failure on the part of the lessee to complete the work of development and operating."[1]

§ 1224. Must pay royalty until surrender of leased premises.—Wherever the right to abandon is intended to be exercised, whether it is provided in the lease or is claimed as matter of custom or natural right, the lessee is bound to pay the minimum rent or royalty until he actually surrenders the possession.[2] And it was held that, where there was a cessation of operations for ten years, and no surrender of possession, and the lease contained a provision of forfeiture for non-payment for thirty days, this provision being for the benefit of the lessor, it was not necessary for him to give notice of his election to consider the lease not forfeited in order to collect rent.[3]

§ 1225. Recovery of possession — Eviction — Grantee's right to rents.—Where a forfeiture for non-payment of rent or royalty occurs, the lessor, or his grantee, may bring ejectment to recover possession without demanding the rent or royalty due and unpaid, and without making any re-entry.[4] It has been decided that an absolute conveyance of oil lands by the lessor without reserving the lessee's right of entry to drill for oil is a constructive eviction, and may, at the option of the lessee, terminate his liability for rent or royalty.[5] If

[1] See *post*, § 1236; Patterson v. Hausbeck, 8 Pa. Super. Ct. 36.

[2] Ormsby Coal Co. v. Bestwick, 129 Pa. St. 592, 18 Atl. Rep. 538; Jenkins v. Clyde Coal Co., 8 Iowa, 18, 14 N. W. Rep. 970; Grummett v. Gingrass (Mich.), 43 N. W. Rep. 999; Jamestown & F. R. Co. v. Egbert, 152 Pa. St. 53, 25 Atl. Rep. 151; Plummer v. Hillside C. & I. Co., 160 Pa. St. 483, 28 Atl. Rep. 853; Northwestern Ohio Nat. Gas Co. v. Browning, 8 Ohio Dec. 188; Aderhold v. Oil Well Supply Co., 158 Pa. St. 401, 28 Atl. Rep. 22.

[3] Ahrns v. Chartiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. Rep. 739.

[4] Boys v. Robinson, 61 N. J. L. 179, 38 Atl. Rep. 813. See generally, Kirk v. Mattier, 140 Mo. 28, 41 S. W. Rep. 252; Beatty v. Gregory, 17 Iowa, 109; Liggett v. Shira, 159 Pa. St. 350, 22 Atl. Rep. 218. See *post*, § 1242.

[5] Mathews v. People's Nat. Gas Co. 179 Pa. St. 165, 36 Atl. Rep. 216.

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in possession, of course he could not be turned out or his rights be ignored.[1] In a Nevada case where the lessee was kept out of possession by threats, his leasehold interest being an undivided two-thirds, and he having been kept out by the owner of the remaining third, it was held that he was not confined to an action for an accounting for the profits which might have been made under the lease, but was entitled to maintain an action for damages for loss occasioned by being kept out of possession.[2] Without passing upon the lessee's rights, an Indiana court says that a conveyance of the leased premises passes all rights of the lessor, including accrued rents.

§ 1226. Forfeiture of the lease.— What are and what are not forfeiture-bearing covenants is not well or fully settled. Since operation of the enterprise and payment of rental or royalty conjointly constitute its chief purpose, it is obvious that the failure to perform either of these requirements will, at the option of the lessor, work a forfeiture.[3] Where the lessee of oil lands agrees to complete four

[1] Paul v. Cragnas (Nev.), 59 Pac. Rep. 857. See also Gage v. Gage, 66 N. H. 282, 29 Atl. Rep. 548, 28 L. R. A. 829.

[2] Chandler v. Pittsburg Plate Glass Co., 20 Ind. App. 165, 50 N. E. Rep. 400.

[3] Doe v. Bancks, 4 Barn. & Ald. 401; Roberts v. Davey, 4 Barn. & Adol. 664, 1 Nev. & M. 443; Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178, 32 C. C. A. 560; Lambie v. Sloss I. & S. Co., 118 Ala. 427, 24 S. Rep. 108; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196; Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. Rep. 234; Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. Rep. 66; Evans v. Consumers' Gas Trust Co., 29 N. E. Rep. 898, 31 L. R. A. 673; Garvey v. Gunther, 51 Mo. App. 545; Fisher v. During, 53 Mo. App. 548; Boys v. Robinson, 61 N. J. L. 179, 38 Atl. Rep. 813; Lane v. Gordon, 46 N. Y. S. 57, 18 App. Div. 438; Eaton v. Alleghany Gas Co., 122 N. Y. 416, 25 N. E. Rep. 981; Maxwell v. Todd, 112 N. C. 677, 16 S. E. Rep. 926; Ohio Oil Co. v. Kelly, 9 Ohio Cir. Ct. 511; Detler v. Holland, 57 Ohio St. 492, 49 N. E. Rep. 690, 40 L. R. A. 266; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. Rep. 1093; Smith v. Whitback, 18 Ohio St. 471; Galey v. Kellerman, 123 Pa. St. 491; Wills v. Mfg. Nat. Gas Co., 130 Pa. St. 222, 5 L. R. A. 603; Ogden v. Hatry, 145 Pa. St. 640; Conger v. Nat. Trans. Co., 165 Pa. St. 561; Springer v. Citizens' Nat. Gas Co., 145 Pa. St. 430; Liggett v. Shira, 159 Pa. St. 350. But see *ante*. § 1217.

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wells the second year, two of them the first six months and the others during the last six months, he has the entire second year within which to complete the boring, and it is sufficient even though all are bored during the last six months.[1]

§ 1227. Forfeiture in general — For mere non-payment redeemable.— It has already appeared, and the law is well settled, that the parties are generally restricted to the terms of the instrument as they made it, interpreted, of course, where proper, by the surrounding circumstances and the customs of the vicinage, and that a forfeiture may be claimed for any breach of forfeiture-bearing covenants or conditions.[2] It may also be incurred by breach of conditions implied by the law.[3] In either case the right of re-entry is perfect and the estate of the lessee terminated upon the exercise of the option by the lessor.[4] But if the breach or cause of forfeiture is for non-payment of rent merely, it may generally be redeemed by prompt payment with interest;[5]

[1] Thomas v. Kirkbridge, 8 Ohio Dec. 181. See also Welty v. Wise, 5 Ohio N. P. 150; Henderson v. Ferrell, 183 Pa. St. 547, 38 Atl. Rep. 1018; Colgan v. Forest Oil Co., 194 Pa. St. 243; McCarty v. Mullins, 5 Pa. Dist. R. 425.

[2] See Kirk v. Mattier, 41 S. W. Rep. 252, 140 Mo. 23; Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. Rep. 970; Sunday Lake M. Co. v. Wakefield (Wis.), 39 N. W. Rep. 136; Woodward v. Mitchell, 140 Ind. 406, 39 N. E. Rep. 437; Vanatta v. Brewer, 22 N. J. Eq. 268. See also *ante*, p. 983, note 3.

[3] Bainb. Mines (1st Am. ed.), p. 215; Barnhart v. Lockwood, 152 Pa. St. 82.

[4] Bainb. Mines, p. 215; Doe v. Bancks, 4 Barn. & Ald. 401; Roberts v. Davy, 4 Barn. & Adol. 664; Adams v. Ore Knob Copper Co., 7 Fed. Rep. 634; Polk Co. Nat. Bank v. Foote Com. Phos. Co., 68 Fed. Rep. 745; Stockbridge Co. v. Cone Iron Works, 102 Mass. 80; Austin v. Huntsville Cons. M. Co., 72 Mo. 535; Alleghany Oil Co. v. Bradford Oil Co., 21 Hun, 26; s. c., affirmed 86 N. Y. 638; Ohio Oil Co. v. Harris, 1 Ohio Dec. 167; McKnight v. Kreutz, 51 Pa. St. 232; s. c. (2d app.), 53 Pa. St. 319; Miller v. Chester Slate Co., 129 Pa. St. 81, 18 Atl. Rep. 565; Palmer v. Truby, 136 Pa. St. 556; Thompson v. Christie, 138 Pa. St. 230; Fleming Oil & Gas Co. v. South Penn. Oil Co., 37 W. Va. 645; Thomas v. Hukill, 36 W. Va. 385; Bowyer v. Seymour, 13 W. Va. 12.

[5] Wakefield v. Sunday Lake M. Co., 85 Mich. 607, 49 N. W. Rep. 135;

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this upon the theory that forfeitures are not favored by the law, and the courts will not enforce them except in a clear case.[1]

§ 1228. Forfeiture clause not self-executing.— As already stated, the lessee may not take advantage of his own laches; and following this principle, even though the lease provides that the failure to perform certain covenants on the part of the lessee renders it null and void, this means nothing more than that it is voidable at the option of the lessor. As was said by the supreme court of Pennsylvania: "The lessees had the right to enter at any time during the eight months and either drill a well or make the stipulated payment. If they did neither within the time limited, their right of entry was extinguished and the contract itself was at an end. But the acts that forfeited their rights did not also forfeit those of the lessor. Their liabilities growing out of their non-performance are to be distinguished from their rights under the contract. The latter they could forfeit, but the former belonged to the lessor, and could be lost only by his act. The lessees promised to complete one well within a given time. This was for the benefit of the lessor. If this was not done he was to be compensated in money. If the money was not paid he was at liberty to rid himself of his tenants and resume possession of his land. But the construction contended for by the plaintiffs in error transfers the punishment for the breach of contract from him on whose default it arises to the innocent injured party."[2]

Gale v. Oil Run Petroleum Co., 6 W. Va. 200; Wesling v. Kroll, 78 Wis. 676, 47 N. W. Rep. 948.

[1] See *post*, § 1240, notes 4, p. 993, and 2, p. 994; Von Schmidt v. Huntington, 1 Cal. 55; McKnight v. Kreutz, 51 Pa. St. 282; Wiseman v. McNulty, 25 Cal. 230; Westcott v. Minnesota M. Co., 23 Mich. 145; Duffield v. Micheals, 102 Fed. Rep. 820; Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235; Heintz v. Shortt, 149 Pa. St. 285; Fleming Oil & Gas Co. v. Southern Pennsylvania Oil Co., 37 W. Va. 645.

[2] Galey Brothers v. Kellerman, 123 Pa. St. 491, 16 Atl. Rep. 474, quoted with approval in Evans v. Consumers' Gas Trust Co., 29 N. E. Rep. 398, 31 L. R. A. 673. See also *ante*, § 1182.

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§ 1229. Voidable only at option of lessor — Time of performance, question of fact.— It has sometimes been held, and this is undoubtedly the law, that where the forfeiture is claimed upon the existence or non-existence of disputable or disputed facts, it becomes a question of fact as to whether it has really taken place or not.[1] In any event, it is manifest that a forfeiture may be waived or claimed at the option of the lessor. The Pennsylvania court, quoting from an able note in Smith's Leading Cases, thus states the law: "Even in the case of a lease for years, when the direction is that it shall become void on breach of the condition, it will only be void at the option of the lessor; the lessee shall not take advantage of his own wrongful performance of the contract in order to destroy the lease, which had perhaps turned out a disadvantageous one."[2] This doctrine seems now well settled in the later cases in Pennsylvania;[3] and the same principle has been upheld in Ohio.[4] Where annual rent is reserved and the lessee fails to drill according to contract within a year, it has been held that the dead rent reserved is not due until the end of the year;[5] but of course this would ordinarily depend upon the language of the instrument itself.

§ 1230. Forfeiture under statutes — Likewise of statutes making leases irrevocable.— In some states, notably Missouri, there are statutory provisions requiring the lessor

[1] Stage v. Boyer, 38 Atl. Rep. 1035, 183 Pa. St. 560; Boys v. Robinson, 61 N. J. L. 179, 38 Atl. Rep. 813. See also Cleminger v. Baden Gas Co., 159 Pa. St. 16; Nelson v. Eschel, 158 Pa. St. 312.

[2] Wills v. Mfg. Nat. Gas Co., 130 Pa. St. 222, 5 L. R. A. 603; also citing Doe v. Bancks, 4 Barn. & Ald. 401; Rede v. Farr, 6 Mau. & S. 121; Arnsby v. Woodward, 6 Barn. & C. 519; Reid v. Parsons, 2 Chitty, 247; Clark v. Jones, 1 Denio, 516; Phelps v. Chesson, 12 Ired. L. 194; Kenrick v. Smick, 7 Watts & S. 41; Sheaffer v. Sheaffer, 37 Pa. St. 525; Wheeling v. Phillips, 10 Pa. Sup. Ct. 634.

[3] Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. Rep. 731.

[4] Woodland Oil Co. v. Crawford, 55 Ohio St. 161.

[5] Evans v. Consumers' Gas Trust Co., 29 N. E. Rep. 298, 31 L. R. A. 673; Watson v. Penn, 108 Ind. 21, 8 N. E. Rep. 636; Raymond v. Thomas, 24 Ind. 476.

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to give notice of the terms of any lease upon his premises, under penalty of it being declared a lease for a given and definite period. And under the statute, where a landlord fails to post in compliance with its terms, the duration of the lease is fixed and will expire accordingly.[1] A sub-tenant who, during the term, buys the landlord's title, takes it freed from the prior claim of the first tenant, even though the lease nominally runs for a longer period.[2] Other state statutes require the leases to be recorded. It has been held that these statutory provisions are valid and binding, and must be observed;[3] and in Wisconsin, under statutory provisions making mining leases irrevocable after valuable mineral has been discovered, it has been held that the rule applies only to leases valid from their inception,[4] and has no application, therefore, to a void lease. Nor does it bind a non-assenting co-tenant. In other words, the statute protects rights properly acquired, but does not create them.

§ 1231. When a tenancy at will.— A lease containing a covenant to the effect that the rights granted are continued so long as the party or successors may deem it proper to operate, was held to create merely a tenancy at will.[5] So, an unauthorized lease will sometimes be held to create a tenancy at will;[6] the reason of the rule being that the lessee is in possession in good faith, spending his money in pursuance of the lease, and ought not to be turned out for technical reasons.

[1] Robinson v. Troup M. Co., 55 Mo. App. 662. For a similar rule elsewhere, see Alleghany Co. v. Snyder, 106 Fed. Rep. 764; Gillmore v. Brown, id.; Northwestern O. Nat. Gas Co. v. Tiffin, 59 Ohio St. 420, 54 N. E. Rep. 77; R. S. Mo. 1899, § 7034.

[2] Robinson v. Troup M. Co., *supra*. See *ante*, § 1225, p. 983.

[3] Kirk v. Mattier, 140 Mo. 33, 41 S. W. Rep. 252; Cleveland & A. Min. Land Co. v. Ross, 135 Mo. 101, 36 S. W. Rep. 216; Fisher v. During, 53 Mo. App. 548; Boone v. Storer, 66 Mo. 43.

[4] R. S. Wis., § 1647; Tipping v. Robbins, 71 Wis. 507, 37 N. W. Rep. 427; s. c., former appeal, 64 Wis. 546, 25 N. W. Rep. 718.

[5] Doe v. Axley, 5 Jones L. (N. C.) 440; Kitchen v. Pridgen, 3 id. 49; Oglesby v. Hughes, 96 Va. 115, 30 S. E. Rep. 439.

[6] Yellow Jacket S. M. Co. v. Stevenson, 5 Nev. 224.

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§ 1232. Renewals — The general rule.— A covenant for renewal manifestly stands upon the same footing as a covenant for a lease, and will be enforcible or not, under the same rules.[1] But provisos in a lease must not be construed as a contract of renewal. For example, where a lease to a coal company was extended for one year under the same terms and conditions as the original lease, except that the royalty should not be less than a specified sum, and where the original lease provided that if any accident should happen to the mine, or if the workmen employed therein should strike, so that the mine should not be operated, the guaranteed royalties should be reduced proportionately, it was held by the Illinois court of appeals that this provision did not apply to the contract of renewal.[2] It is not infrequent to provide in the lease that where accidents occur, or where the mine is not operated by reason of strikes or injunction, the period of the lease will be extended correspondingly.[3] But in general this provision will not be implied.

§ 1233. Lease construed as an entirety — General consideration supports covenant of renewal.— The federal court recently had under consideration an Ohio lease, by the terms of which there was to be a tenancy of two years and as much longer as oil and gas were found in paying quantities, not exceeding twenty-five years in all, the lease containing a provision of forfeiture if no well was bored within two years, unless the lessee paid for the further delay at the rate of a dollar an acre per year thereafter. It was contended that, even though this consideration could be held sufficient for the two years, it could not be held to support the covenant for renewal for the entire period. In denying this result and contention, and in construing the lease as providing for renewal from year to year upon payment of the

[1] Harnett v. Yielding, 1 Scho. & L. 549; Carne v. Mitchell, 15 L. J. (N. S.) 287; Copper M. Co. v. Beech, 14 Beav. 78; Alleghany Co. v. Snyder, 106 Fed. Rep. 764.

[2] Cons. Coal Co. v. Rainey, 69 Ill. App. 182.

[3] Stahl v. Van Vleck, 58 Ohio St. 136, 41 N. E. Rep. 35.

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dollar per acre, the circuit court of appeals, speaking through Judge Day, and after laying down the familiar rule that all parts of the lease must be given effect if possible, held that this could be done only by holding that the payment of one dollar per acre each year was one of the considerations for delay in sinking the well; thus virtually holding this penalty to be, as in fact it was, dead rent merely.[1] This decision is not altogether in harmony with the New York case,[2] which held the payment of minimum royalty, under a similar contract, insufficient. The distinction is not so marked, however, when we remember that in the New York case the lessees had, by their own acts in permitting a "squeeze" to occur, made it impossible for them, or anyone else, to work the property. In each case the contract received the construction the court thought, in the light of the action of the parties, they intended for it; and this is following the true rule.[3]

§ 1234. When a perpetual renewal.— A., the owner of coal land by lease perpetual until the coal was mined out, leased the coal to B. for a royalty; afterwards, before the coal was mined out, A., B. and C. made a parol agreement by which C. was to mine the coal and pay the royalty; under this agreement C. mined coal, paying for a portion but not all of it, at the agreed rate, and it was held that he was liable to A. for the entire royalty under this oral agreement.[4] Where a lease contained the covenant that T. would always, at any time when and as often as required by the lessees, or when their successors or assigns should request the same, demise, etc., to the lessees, their successors or assigns, respectively, all the described premises, it was held to constitute a covenant for perpetual renewal.[5]

[1] Alleghany Oil Co. v. Snyder, and Gillmore v. Brown (C. C. A.), 106 Fed. Rep. 764, citing (which see) Harris v. Ohio Oil Co., 57 Pa. St. 129, 50 N. E. Rep. 1129; Northwestern Ohio Gas Co. v. Tiffin, 59 Ohio St. 420, 54 N. E. Rep. 77.

[2] Genet v. Delaware & H. Canal Co., 136 N. Y. 593, 32 N. E. Rep. 1078; *ante*, § 1202, note 1, p. 972.

[3] *Post*, § 1281; *ante*, § 1118.

[4] Watt v. Dininny, 141 Pa. St. 22, 21 Atl. Rep. 519.

[5] Copper M. Co. v. Beach, 13 Beav.

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§ 1235. Further as to forfeiture — Special circumstances — Election to terminate held unnecessary.— While the general rule, as we have stated elsewhere, is that forfeiture-bearing clauses in a lease are not generally self-executing, yet, even in such cases as the one mentioned in a preceding section,[1] where there is a right of forfeiture reserved, but only upon the condition that the lessee shall perform one of two things, he is not compelled to perform both, but the performance of either will save forfeiture. He has the election to pay or to work, and he cannot refuse both.[2] For example, a land-owner executed a gas and oil lease with the right to drill and operate wells in consideration of an agreed division of the product; the lease contained the condition that it should be void if no wells should be completed within a year, unless the lessee paid a certain agreed sum as liquidated damages for each year during which completion was delayed. It was held that omission to bore the well or pay the amount agreed upon *ipso facto* terminated the lease.[3] This is an extreme case, the general rule being that forfeiture must be claimed before it can be said to have occurred.[4]

§ 1236. Enforcing forfeiture clause — Waiver.— The lessor intending to claim a forfeiture should, as a general rule, exercise his right by giving notice, or by re-entry for breach, or some other appropriate method within a reasonable time or he will be held to have waived it.[5] But

478, citing Bridges v. Hitchcock, 5 Bro. P. C. 6; Cook v. Booth, Cowp. 819; Furnival v. Crew, 3 Atk. 83; Moore v. Foley, 6 Ves. 232; Iggulden v. May, 9 Ves. 325, 7 East, 237; Dowling v. Mill, 1 Mod. 541; Harnett v. Yielding, 2 Sch. & L. 556; Brown v. Tighs, 2 Cl. & Fin. 396; Sheppard v. Doolan, 3 Dr. & War. 1; Price v. Assheton, 1 You. & Coll. Ex. 83; Smyth v. Nangle, 7 Cl. & Fin. 405. See also Page v. Estey, 54 Me. 319.

[1] *Ante*, § 1215; Alleghany Oil Co. v. Snyder, and Gillmore v. Brown (C. C. A.), 106 Fed. Rep. 764.

[2] McMillan v. Philadelphia Oil Co., 159 Pa. St. 142.

[3] Kenton Gas & Electric Co. v. Dorney, 17 Ohio Cir. Ct. Rep. 101.

[4] See *post*, § 1240, note 2, p. 994.

[5] Thompson v. Christie, 138 Pa. St. 230, 11 L. R. A. 236; Carnegie Nat. Gas Co. v. Philadelphia Co., 158 Pa. St. 317; Alleghany Oil Co. v. Bradford, 86 N. Y. 638, affirming

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waiver of one claim for breach in a lease is not a waiver of all others.[1]

§ 1237. Gas not embraced in oil lease — Boring after forfeiture.— Rather a novel case recently arose in Pennsylvania. Certain premises were leased to the lessee, the same to be occupied and worked for petroleum, rock, or carbon oil, and not for any other purpose whatever. Operations failed to develop any oil, but a paying gas well was opened. The lessees first claimed this gas upon the ground that the language of the lease was sufficient to include it. This was denied by the supreme court, in an opinion holding oil and gas not to be synonymous.[2] Later the lessees claimed compensation out of the proceeds from this gas well for moneys expended in the effort to develop oil, which was also denied,[3] the lease having in the meantime been forfeited, under its terms, for failure by the lessees to procure oil, though this does not appear to have been a material question in the case. It may also be stated that the lessee is not entitled to compensation for boring done after the lease has been declared forfeited.[4]

§ 1238. Abandonment — When permitted.— Mr. Bainbridge seems to reason from the early cases that the right of abandonment exists generally.[5] But, manifestly, it should find its authority in the instrument of lease itself, or seri-

21 Hun, 26; Guffey v. Hukill, 34 W. Va. 49, 8 L. R. A. 759; Thomas v. Hukill, 34 W. Va. 385; Baldwin v. Ohio Oil Co., 18 Ohio Cir. Ct. Rep. 519, 7 Ohio Dec. 50. See *ante*, § 1225.

[1] Murray v. Heinze, 17 Mont. 358, 42 Pac. Rep. 1057.

[2] Truby v. Palmer (Pa.), 6 Atl. Rep. 74.

[3] Palmer v. Truby, 136 Pa. St. 556, reported in 20 Atl. Rep. 516, as Allen v. Palmer.

[4] Detlor v. Holland, 57 Ohio St. 492, 49 N. E. Rep. 690.

[5] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 211, 213. See also Friar v. Grey, 7 L. J. (N. S.) Q. B. 301; Price v. Nicholas, 4 Hughes, 616, 19 Fed. Cas. 1320, No. 11,415; Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. Rep. 120; Ormsby Coal Co. v. Bestwick (Pa.), 18 Atl. Rep. 538; Van Meter v. Chicago & V. M. Coal Co. (Iowa), 55 N. W. Rep. 106; McKee v. Colwell, 7 Pa. Sup. Ct. 607; Paine v. Griffiths, 86 Fed. Rep. 450; Worrall v. Wilson, 101 Iowa, 475, 70 N. W. Rep. 619; Barker v. Dale, 17 Pittsb. Leg. J. 19, 2 Fed. Cas. 810, No. 988; Crawford v. Ritchey, 43

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ous loss might be entailed upon the lessor;[1] the general rule being that the covenants are binding. Whence it follows that, in the absence of appropriate provision in the lease or a controlling custom, the lessee is bound to take from the mine the amount stipulated in the lease, and to occupy it for the term if necessary, or pay at least the minimum or dead rent.[2]

§ 1239. Notice in general — When necessary.— Unless the lease stipulates to the contrary in the most positive terms, it is manifest that, upon principles of exact justice, in case of intention to claim a forfeiture, notice of the intention should first be given, and a reasonable time allowed in most cases to avoid the default.[3] And the same rule should apply to an intention to abandon, where abandonment is permitted.[4]

§ 1240. Forfeiture — Where burden rests — What is.— It would scarcely seem necessary to state that the burden of the affirmative of an allegation rests on him who makes

W. Va. 252, 27 S. E. Rep. 220; Boys v. Robinson, 38 Atl. Rep. 813; Cole v. Taylor, 8 Pa. Sup. Ct. 19; Patterson v. Hausbeck, 8 id. 36; Wheeling v. Phillips, 10 id. 634; Plummer v. Hillside Coal & Iron Co., 160 Pa. St. 433, 28 Atl. Rep. 853; Snodgrass v. So. Pa. Oil Co. (W. Va.), 35 S. E. Rep. 820; Miller v. Chester Slate Co., 129 Pa. St. 81, 18 Atl. Rep. 565; Eclipse Oil Co. v. So. Pa. Oil Co. (W. Va.), 34 S. E. Rep. 923.

[1] See *ante*, § 1222; *post*, § 1240.

[2] See *ante*, § 1182; Marquis of Bute v. Thompson, 13 M. & W. 487; Clifford v. Watts, 5 C. P. 577; Price v. Nicholas, 4 Hughes, 616, 19 Fed. Cas. 1320; Flynn v. White Breast Coal & M. Co., 72 Iowa, 738; Randolph v. Harden, 42 Iowa, 228; Watson Coal & M. Co. v. Casteel, 73 Ind. 296; Murray v. Heinze, 17 Mont. 353, 42 Pac. Rep. 1057, 43 Pac. Rep. 714; Hecksher v. Schaeffer (Pa.), 14 Atl. Rep. 53; Plummer v. Hillside Coal & Iron Co., 160 Pa. St. 433, 28 Atl. Rep. 853; Powell v. Burrows, 54 Pa. St. 329; Eshleman v. Thompson, 62 Pa. St. 495; Ormsby Coal Co. v. Bestwick (Pa.), 18 Atl. Rep. 538; Knight v. Kreutz, 51 Pa. St. 232; Raisbeck v. Anthony, 73 Wis. 572, 41 N. W. Rep. 72.

[3] *Ante*, § 1227; Bainb. Mines, pp. 215, 216: Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. Rep. 270; Wakefield v. Sunday Lake M. Co., 85 Mich. 607, 49 N. W. Rep. 135; Whitehead v. Bennett, 4 L. T. (N. S.) 818; Rolleston v. New, 4 K. & J. 640; Southern Pa. Oil Co. v. Stone (Tenn.), 57 S. W. Rep. 874.

[4] Bainb. Mines, pp. 218, 220.

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it, and likewise one claiming a forfeiture of a coal lease upon the ground of a breach of conditions must assume the burden and establish such forfeiture by a preponderance of the evidence. And a mining lease forfeitable on default of the lessee, or on breach of any of the covenants authorizing the lessor to take possession without any notice or legal process, is enforceable in its terms.[1] But a stipulation in a contract for the use of mineral lands, that the lessee shall use all economy in the conduct and management of the mining enterprise is too uncertain to be recognized as a condition for the breach of which a forfeiture may be declared;[2] though where a lease of mining ground provides for a forfeiture if the lessees fail to work for three weeks, and there is a cessation of work for thirteen or fourteen months, after which the work is resumed, the question whether the lessor consented to the cessation and allowed the lessees to retain their rights is for the jury.[3]

Non-payment of rent or royalty promptly will not alone work a forfeiture, where they are paid upon notice and before the commencement of the action.[4] Thus, in a case arising in the federal court in Florida, where it appeared that T. leased certain lands to F. for a period of twenty years, by an instrument providing for the construction of a phosphate plant of a certain capacity within a specified time, also providing for a royalty and a monthly rent of one hundred and twenty-five dollars immediately upon completion of the plant, which should be credited on the royalty account, and F. assigned the lease immediately, and the assignee took possession and erected a plant, but of a lesser capacity than the one required, though how much less did not appear, the circuit court of appeals of the fifth circuit, ruling on this question, held that the provision in the lease

[1] Fisher v. During, 53 Mo. App. 548.

[2] Benavides v. Hunt, 79 Tex. 383, 15 S. W. Rep. 396.

[3] Wesling v. Kroll, 78 Wis. 686, 47 N. W. Rep. 943.

[4] Wakefield v. Sunday Lake M. Co., 85 Mich. 605, 49 N. W. Rep. 135. See also *ante*, §§ 1222, 1227, 1238–39.

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regarding the erection of the plant was not a forfeiture-bearing condition, such as to authorize the grantees of the lessor to oust the tenant, as one holding after the expiration of his right.[1]

As a general rule the law is opposed to forfeitures, and he who claims them must find a complete foundation in the covenant which he claims has been violated, or his action will not succeed. Thus, under a lease of land for a hundred years, possession to extend only to its use as a coal field, executed in consideration of a certain cash price and a yearly rental, the lessee's failure to pay rent or to search for coal for a number of years is not conclusive evidence of his abandonment of the lease.[2] But where a lease is made in consideration of a percentage of the profits, and the lessee fails to take possession and mine the minerals within a reasonable time, it may be forfeited.[3] So it has been held that a lease for mining purposes is forfeited by a failure to work the mines for a number of years;[4] and the lessors all being in possession, no ceremony of entry is necessary, nor is any notice of a forfeiture.[5] And when a forfeiture is claimed, the burden is on the lessee to prove its waiver.[6]

§ 1241. Intent is controlling.— The intent of the parties is always a valuable aid in construing the covenants of a lease, the same as in any other contract, and it must be gleaned in the same way, from the instrument itself and the surrounding circumstances if necessary, with the aid of parol evidence in the cases where the same is permitted by

[1] Polk County Nat. Bank v. Foote Com. Phos. Co., 68 Fed. Rep. 545, 16 C. C. A. 33.

[2] Plummer v. Hillside Coal Co., 160 Pa. St. 483, 28 Atl. Rep. 853. See Venture Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. Rep. 732; McNish v. Stone, 152 Pa. St. 457.

[3] Shenandoah Coal Co. v. Hise, 92 Va. 238, 23 S. E. Rep. 303. See also Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. Rep. 120; Warren v. Wheeler, 8 Metc. (Mass.) 97; Caldwell v. Fulton, 31 Pa. St. 475.

[4] Maxwell v. Todd, 112 N. C. 677, 16 S. E. Rep. 926.

[5] Id. See also *ante*, § 1225. But see Jenkins v. Clyde Coal Co., 82 Iowa, 618.

[6] Wesling v. Kroll, 78 Wis. 636.

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the law to explain a patent ambiguity merely.[1] For it is considered that he who has the *jus disponendi* may attach any conditions to his grant which are not unreasonable, repugnant or illegal. As the law regards the intention of the parties as expressed by their deed alone, as we have seen, no particular form of words is necessary to constitute a valid covenant. Thus, in the lease of a coal mine, it was recited that before the sealing of the indenture it was agreed that plaintiff should have the part already dug, and it was decided by Lord Chief Justice Hale that this amounted to a covenant.[2] A covenant, like a grant, in cases of doubt, is always taken most strongly against the person making it.[3]

§ 1242. Tenancy — When terminated — General duties and liabilities.— A deed granting the right to prospect and mine at a rent payable quarterly, and running so long as the lessee or its successors may deem it proper to operate, was held a lease from year to year, requiring a six months' notice to quit before the lessor could terminate it.[4] And a mining lease for a term certain, saving only to the lessor the right of tillage, is exclusive, and the lessor cannot mine within the tenement.[5]

It is as well settled in mining leasing as it is in the general law of landlord and tenant, that the lessee cannot deny the lessor's title until he surrenders possession. As said by the supreme court of Nevada, by Biglow, C. J.: "The lessee having entered into possession under the lease, the outstanding title purchased from Byrnes, whether good or bad, could not have been asserted by him until after he had surrendered possession to those from whom he had obtained it.

[1] See *ante*, §§ 1202, 1233.

[2] Holder v. Taylor, 1 Rolle's Abr. 518; Severn v. Clark, 2 Leon. 122; Duke of Northumberland v. Errington, 5 T. R. 526; Sampson v. Easterby, 9 B. & C. 505; Alleghany Oil Co. v. Snyder and Gillmore v. Brown, 106 Fed. Rep. 764.

[3] Bainb. Mines, p. 210; Rockw. Mines, p. 560; Bac. Abr., Cov. F.

[4] Doe dem. Patten v. Axley, 5 Jones (50 N. C.), 440, 8 M. R. 472.

[5] Barker v. Dale, 8 Pittsb. Leg. J. 190, 2 Fed. Cas. 810, 8 M. R. 597.

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Such being the case, his assignee of the lease, the defendant, stands in no better position, and is also estopped to deny that title; and as no question is made that the plaintiffs have succeeded to the title, he is equally estopped to deny that title."[1]

This is undoubtedly the general rule; and while there are a few cases which seem to follow the dictum that it is sufficient to give notice to the landlord under whom the entry was made that the lessee attorns to a new landlord,[2] the better and more universal opinion, as well as sound reasoning, is in favor of the doctrine that the tenant must surrender possession. It is sometimes the case that a tenancy becomes merged into a new estate, and in such case, of course, a different rule applies.[3] But of course this rule does not apply unless the relation of landlord and tenant is established. Thus, in ejectment by the patentee of a mining claim, where it appears that certain defendants, after the date of the patent, paid a small sum as rent for the privilege of occupying the premises, and it does not appear under what circumstances, nor for what premises, the payment was made, the relation of landlord and tenant is not established so as to estop defendants from denying the patentee's title.[4] The relation of landlord and tenant, so far as it refers to the covenant for payment of rent, can be dissolved only by payment or an agreement between themselves; or, of course, by termination of the tenancy.[5]

§ 1243. Summary — The doctrine of this article restated.— From the aggregation of discordant elements and somewhat loosely connected and badly arranged statements of the law collected in the foregoing sections, so far as the

[1] Byrnes v. Douglass (Nev.), 42 Pac. Rep. 798. See also Wood, Landlord & Tenant, § 282; Taylor, Landlord & Tenant, 91; Big. Est. 396; Rector v. Gibbon, 111 U. S. 276.

[2] Clark v. Oil Run Petroleum Co., 6 W. Va. 200, 9 M. R. 1; DeLancy v. Ganong, 9 N. Y. 9.

[3] Lehigh Co. v. Harlan, 27 Pa. St. 429, 8 M. R. 428.

[4] Lakin v. Roberts (C. C. A.), 54 Fed. Rep. 461.

[5] Fisher v. Milliken, 8 Pa. St. 111.

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law seems settled and capable of definite ascertainment, we are justified in extracting the following conclusions:

First. The name applied to the instrument is of little or no consequence, the ultimate object being to ascertain the intention of the parties, and from that to determine whether they have intended the instrument to be good as an absolute demise for a fixed period, with a minimum royalty or dead rent reserved, or whether they intended it as a sale of the entire mass of the estate thus severed with the right of entry and possession during the period of removal; or, in other words, and especially as to oil and gas, during the exhaustion of the product. But as to these last, it is not to be assumed that in all cases these leases or instruments so formed are to be construed as sales of the product. They are more generally leases pure and simple, with the period of duration thus rendered technically uncertain, but certain in one respect, and determinable upon the exhaustion of the product.

Second. The lease is to be construed as a whole, and, upon the well recognized lines of construing written instruments, due force and effect must be given to every part thereof.

Third. Wherever statutes require the posting of notices upon the premises, giving the terms and conditions of the lease, or where they require the recording of the lease, they are to be complied with, and notice is thus constructively given, even though the lease, in form or execution, be defective. And in all such cases, and in all cases where possession is actually taken under the lease, the ordinary notice which possession imparts in the one case, and the terms of the instrument as actually given in the other, must be observed, and any attempted subsequent leasing or similar steps are considered as taken with reference to such circumstances.

Fourth. Leases, as a general rule, should be certain as respects the term of the demise, the right of entry and re-entry, with the circumstances under which forfeiture may be claimed, and should give the right of abandonment, or the latter does not exist.

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Fifth. While the subject of royalty generally is reserved to the following article, we have been compelled to advert to it incidentally in some of the foregoing sections to the extent of showing wherein it becomes an element or condition of the tenancy. Where the tenancy is limited to the exhaustion of the mine the dead rent must be paid to that time, and it is held not a sufficient excuse that the coal or mineral is difficult to obtain. But the better line of reasoning seems to be that reasonable diligence in the exhaustion of minerals and in the pursuit of oil or gas is all that can be reasonably required, and that in no case will either law or equity require the performance of impossibilities. And in such extreme cases the law will convert the tenancy into a fixed period or a tenancy at will, as the case may be. But while this is true on the one hand, the lessee may not arbitrarily refuse to mine or bore.

Sixth. The law frowns upon forfeiture, and will not permit it to be exacted except for good and sufficient reasons; and where the right to claim a forfeiture is reserved to the lessor, he must exercise reasonable diligence in asserting his rights, or he will be controlled by the general doctrine of waiver. But a waiver of one breach is not a waiver of others, nor is the waiver of one condition to be construed as the waiver of others. The forfeiture clause in instruments is thus seen to be for the benefit of the lessor, and is not generally self-executing, and notice of intention to claim must in general be given.

Article D.

Rents and Royalties.

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1274. State's action on royalty bond.
1275. Each operation distinct — No right to mix product of different mines.
1276. Summary — The doctrine of this article restated.

§ 1251. Royalties defined and classified — Outlines.— Royalty is the name generally applied to the rent reserved to the lessor in leases of mines, payable either in kind or money, and generally based upon the quantity or value, or both, of the product. It is quite apparent from the matter set forth in the foregoing sections that the legal learning on the subject of mining leases is by no means settled, and the opinions of the judges are not harmonious. Upon the involved subject of royalty, however, the trend of judicial opinion is indicative of a disposition looking towards a general classification thereof upon at least three lines:

First. Upon a basis of clean ore after deducting mining and treatment charges, including washing or concentrating, which would likewise include, in the west, the process of jigging or concentrating to reduce ore to a marketable condition.

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Second. The net product after paying cost of transportation, marketing, sampling and treating, after the ore is raised or mined. This is the basis generally adopted in the west in mining the precious metals, and in such case the transportation and treatment include the railway freight, the sampling charges and the commission for selling.

Third. Based upon a graduated rate per ton of coal or iron ore raised, mined and ready for marketing. This is the basis largely in force in the coal and iron mining districts, and the coal is often again classified into at least two classes, the lump coal passing over a certain mesh screen, and the finer coal rejected by a smaller screen, with occasional interests in the culm or slack. We will proceed to consider these in their order.

§ 1252. On the basis of clean ore or coal.— In such cases the expense of cleaning is often a matter for the lessee. For example, in a leading case in Tennessee where a lease of mineral land provided that the lessee should pay a royalty of one-tenth on the product of the mine, delivered at the mine or shaft in shipping order or accessible to wagons, or pay for the same the cost price of mining and delivery as above stated. For some time the ore was taken from the mine by hand-shovels, loaded into wagons, and afterwards thrown on reels, sifted and weighed, such weight forming the basis of payment of royalty; later the lessees put in an improvement in the shape of expensive machinery to sift and wash the ore, and on the trial of an action brought for the royalty, the court decided that the cost of the machinery did not enter into the cost of mining contemplated by the parties as the basis of royalty.[1] It is not our purpose in this work to cite to any great extent authorities on elementary principles; it is only under peculiar circumstances and

[1] Nunnelly v. Warner Iron Co., 91 Tenn. 282, 29 S. W. Rep. 124. But see Van Meter v. C. & V. M. Coal Co., 88 Iowa, 92, 55 N. W. Rep. 106; Foster Coal Co. v. Moherman, 9 Ohio Cir. Ct. 544; Walker v. Tucker, 70 Ill. 527, 9 M. R. 672; Bute v. Thompson, 13 M. & W. 537, 8 M. R. 371.

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extreme cases in which courts need generally seek authority, precedent or guidance.

§ 1253. Of the net product — Duty as to marketing.— This provision is the one, as we have said, most common in the west, and it is customary in making mining leases to provide for abandonment in case no merchantable ore is found, or in case of being drowned out by water, or prevented by other unforeseen calamity from continuing operations. It is likewise customary to provide that cessation of work in case of interruption by process of court will not work a forfeiture. There is little more to be added to what has already been said on this branch; but where a mining lease contains a covenant by the lessees to pay a certain royalty, which shall amount to at least a given sum, they are not liable, after testing, if no merchantable ore is found.[1] But of course this test must be made in good faith,[2] and a lessee may quit at any time under a lease containing no covenant to work.[3]

It would seem to be plain in this class of cases, in the absence of stipulation to the contrary, that the lessee is bound to seek the best market if he markets the ore; that he should use reasonable care in sorting and cleaning it, and where jigging and concentrating is also provided for, or is customary, it should be done in the most approved manner. In short, from mining the ore, through every step to the marketing, careful and prudent workmanship and conduct and fair business dealing are required.

§ 1254. For a graduated rate.— Another mode of paying royalty is upon the basis of a graduated rate for each class of the product, making the rate different upon one class

[1] Gribbin v. Atkinson, 64 Mich. 651, 31 N. W. Rep. 570.

[2] *Ante*, §§ 1182, 1202.

[3] Glasgow v. Chartiers Co., 25 Atl. Rep. 232; Gowan v. Christie, 2 Scotch App. 273, 5 Moak, 114, 8 M. R. 688; Strelley v. Pearson, 15 Ch. Div. 113, 7 M. R. 618; Drake v. Laco, 157 Pa. St. 17, 27 Atl. Rep. 538; Smith v. Munhall, 139 Pa. St. 253, 21 Atl. Rep. 735.

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from that on others. Of this mode it is sufficient to say that the lessee may not, from motives of his own, or fraudulently, arrange the higher into the lower class and attempt to pay accordingly. For example, where a lease provides for a royalty for lump and nut coal at different rates, the lessee cannot escape the royalty on lump coal by reducing it to the smaller size, even though the demand in the market is greater for such smaller coal.[1]

§ 1255. Of the royalty based on a minimum rate per ton.— It may be laid down as a general rule in this class of cases, that where the stipulations of the lease require the mining of a certain number of tons per annum or per month, and the payment of a fixed royalty thereon, the lessor is entitled to be paid the minimum amount, that is, whatever the minimum number of tons would net him. He is entitled to receive not only the stipulated rent, but this is a stipulated damage for occupation. There are a few decisions to the contrary, based upon the peculiar language used in the lease under consideration, but the foregoing propositions are supported by the great weight of authority.[2]

§ 1256. Meaning of merchantable and clean ore, and of mine run.— It is sometimes said that the words "clean ore"

[1] Wright v. Warrior Run Coal Co., 182 Pa. St. 514, 38 Atl. Rep. 491; Schooley v. Butler M. Co., 175 Pa. St. 261, 34 Atl. Rep. 639; s. c., 9 Kulp, 291.

[2] Central Apallachian Co. v. Buchanan (C. C. A.), 73 Fed. Rep. 1006; Genet v. Delaware & Hudson Canal Co., 163 N. Y. 178, 57 N. E. Rep. 297; Walker v. Tucker, 70 Ill. 527, 8 M. R. 672; Bute v. Thompson, 13 M. & W. 437, 8 M. R. 371; Watson Coal Co. v. Casteel, 73 Ind. 296, 9 M. R. 130; Schooley v. Butler M. Co., 175 Pa. St. 261, 34 Atl. Rep. 639; Genet v. Delaware & Hudson Canal Co., 37 N. Y. S. 1087; Woodward v. Mitchell, 140 Ind. 406; Renter v. McHenry Coal Co. (Ky.), 14 S. W. Rep. 678; Genet v. Delaware & Hudson Canal Co., 33 N. Y. S. 394, 59 Hun, 624; Garman v. Potts, 135 Pa. St. 506; McDowal v. Hendrix, 67 Ind. 513, 9 M. R. 96; Phillips v. Jones, 8 M. R. 344; Bell v. Truit, 9 Bush, 257, 8 M. R. 649; Cons. Coal Co. v. Peers, 150 Ill. 344; Lehigh Coal Co. v. Bamford, 150 U. S. 605; Timlin v. Brown, 158 Pa. St. 606, 28 Atl. Rep. 236; Drake v. Laco, 157 Pa. St. 17, 27 Atl. Rep. 588.

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and similar expressions in a lease presuppose the existence of such ore within the mine, and where, after due diligence, no ore answering such description is found, the royalty is not collectible.[1] But where there is no exhaustion of the product, of course the rule does not apply, and the lessee is not relieved from his covenant to pay minimum royalty simply because he does not take it out.[2] So, where royalty was payable on the coal mine defined as "all mine run," it was held that the royalty applied to all coal as it came from the mine.[3]

§ 1257. Meaning of "net proceeds" as applied in the western states.— In the western states the practice has become almost universal, as applied to the royalties payable on ores mined and marketed from precious metal mines, to base the payments upon net proceeds, which means generally the price received on the sale of ore less the smelter charges and railroad freights. Sometimes it includes sampling charges, but never mining charges, and very seldom wagon freight, unless the lease reads "a certain percentage of the ore or net value of the ore delivered on the dump," in which case, of course, only mining charges are excluded. In defining the meaning of "net proceeds" the court of appeals of Colorado very clearly states the position of the parties in the following words: "We are referred to a number of authorities in which the definition is given of the words 'net proceeds.' We need not specially notice these authorities, because we are in perfect agreement with them. The words 'net proceeds,' as used in a contract, where their signification is not qualified or restricted by

[1] Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. Rep. 427; Diamond M. Co. v. Buckeye M. Co., 70 Minn. 500, 73 N. W. Rep. 507; Ray v. Hodge, 15 Oreg. 20, 13 Pac. Rep. 599; Boyer v. Fulmer, 176 Pa. St. 282, 35 Atl. Rep. 235, distinguishing Timlin v. Brown, 158 Pa. St. 606; Yank v. Bordeaux, 23 Mont. 205, 58 Pac. Rep. 42; *post*, § 1262; authorities *ante*, § 1255.

[2] Bannan v. Miller, 19 Pa. Co. Ct. Rep. 244. See also Bannan v. Graeff, 40 Atl. Rep. 105, 48 W. N. C. 350.

[3] Harden v. Thompson (Ky.), 57 S. W. Rep. 12.

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other words in the same contract, mean what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted. . . . They have confined the deductions to be made from the gross proceeds, in order that the result may be net proceeds, within certain limits. They say that the royalties shall be paid 'on the net proceeds from all smelter and freight charges and mill returns.' These words are not well put together, but every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that freight charges and charges for treatment are to come out of the gross mill or smelter values, and what is left is the net proceeds."[1]

§ 1258. Net proceeds as measure of damages.— In a Utah case, where two members of a mining partnership redeemed property from a sheriff's sale, under circumstances creating a trust in favor of the other members of the partnership, in an action for an accounting, the purchasers having remained in possession, worked the mine extensively, and taken out large quantities of ore, it was held that the defendants having taken possession of the mine with the consent of the plaintiff, and having worked it in good faith, were entitled to compensation for all reasonable expenditures for the preservation, development and permanent improvement of the property to the extent that its value was enhanced thereby, leaving the net proceeds as the measure of the accounting, excluding the cost of a dead-work tunnel run for prospecting purposes, in which nothing was found.[2]

§ 1259. Royalty covenants generally — Delay and dead rent.— It will thus be seen that the amount of rent reserved

[1] Maloney v. Love, 11 Colo. App. 288, 52 Pac. Rep. 1029; Gorst v. Timothy, 2 C. & R. 350; Mollie Gibson Cons. M. Co. v. Thatcher, 57 Fed. Rep. 865; Yank v. Bordeaux, 23 Mont. 205, 58 Pac. Rep. 42.

[2] Wasatch M. Co. v. Jennings, 14 Utah, 221, 46 Pac. Rep. 1006. See also Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Maye v. Yoppen, 23 Cal. 306.

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in the nature of royalties is very largely, and sometimes exclusively, measured by the output. Of course, no rent of any kind, as we shall see later on, as a general rule, becomes payable until possession is taken, unless there are stipulations in the lease to the contrary. In addition to the royalty measured by the output there is generally a fixed sum, usually called dead rent, or rent merely, which is payable at all events, whether the mine be operated or not; and this sum is not ordinarily dependent upon taking possession, but goes as a compensation for the right to exercise the option to take possession. Leases manifestly are entered into with the expectation on the part of the lessor of an income or compensation for the use of his land and destruction of the substance; that is to say, the mining, pumping or reducing it to possession and marketing the product. It necessarily follows, therefore, and the authorities are uniform to the effect, that, with the exception of very few peculiar cases governed essentially by their own surrounding circumstances, the rents and royalties reserved, since they furnish the consideration for the contract in the beginning, should be paid in substantially the form and manner provided for, and according to the terms of the lease. So positive is the law upon this question, that, with very rare exceptions and where the breach is mere non-payment of a money demand little more than nominal in amount, a forfeiture of the lease may be enforced as a penalty for non-payment of rent and royalty and non-performance of rent and royalty covenants.[1]

The Minnesota supreme court divides mining leases for the payment of dead rent or royalty into two classes: First, those which require its payment as a dead rent, irrespective of

[1] Clifton v. Walmesley, 5 T. R. 564; Senhouse v. Harris, 5 L. T. (N. S.) 635; Palmer v. Wallbridge, 15 Can. S. C. 650; Bamford v. Lehigh Zinc & Iron Co., 33 Fed. Rep. 677; Malcomson v. Wappoo Mills, 35 Fed. Rep. 907; Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871; Higgins v. California Petroleum & A. Co., 109 Cal. 304, 41 Pac. Rep. 1087; Cons. Coal Co. v. Peers, 150 Ill. 344; McDowell v. Hendrix, 67 Ind. 513; Carr v. White Breast Fuel Co., 88 Iowa. 136, 55 N. W. Rep. 205; Richardson v. Downs (Ky.), 16 S. W. Rep. 84; Render v. McHenry Coal Co. (Ky.), 14 S. W. Rep. 678.

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the amount or quality of the product; and second, those which require the mining of a stipulated amount of ore, or, upon failure to do so, the payment of the royalty upon it.[1] And, following this policy, where a lease of lands for a certain number of years, "for the purpose of exploring for, mining, taking out and removing the merchantable shipping ore which is or may hereafter be found in, on or under said lands," provided that the lessee would mine a specified number of tons of coal each year, or pay royalty upon that amount, whether mined or not, the court held that this did not amount to a covenant to pay royalty whether the ore existed or not, but only to pay the royalty if the ore existed, whether mined or not.

The court further decided that, where operations by the lessee failed to disclose the presence of "merchantable shipping ore," the lessee was no longer bound to pay the minimum royalty, nor to give the sixty days' notice of intention to abandon provided for in the lease.[2] The court thus places this case in the second class, as it were. Of course, had the lease provided for the payment of a certain sum as rent throughout the term, whether the lessee worked or not, the rule would be different, as would undoubtedly have been the decision; for wherever the payment of a certain sum as rent is one of the elements of consideration in a contract for the use and occupation of land, the lessor is entitled to it in all events.[3] As was said by the court of appeals of Kentucky: "A lease of land for a specified time imparts a right to the lessor to recover the amount of rent the lessee covenants to pay, whether he has actually occupied and used the leased premises or not, if he was not kept out of the possession by the lessor."[4]

[1] Diamond Iron M. Co. v. Buckeye Iron M. Co., 70 Minn. 500, 73 N. W. Rep. 507; Gribben v. Atkinson, 64 Mich. 651, 31 N. W. Rep. 570. Compare Palmer v. Wallbridge, 15 Can. Sup. Ct. 650. See also *post*, § 1263.

[2] Mining Co. v. Buckeye M. Co., *supra*, citing Gribben v. Atkinson, *supra*. But see *post*, §§ 1261–62.

[3] *Post*, § 1272.

[4] Richardson v. Downs (Ky.), 16 S. W. Rep. 84. See also Coal Creek M. & Mfg. Co. v. Tennessee C. & I.

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From the foregoing it is quite apparent that royalty and rent, while sometimes synonymous, do not always mean the same thing. Indeed, it is often the case that they mean quite different things.[1] Thus, royalty may in fact be rent, but rent is seldom or never the same as royalty.

§ 1260. Same subject — Minimum royalty and dead rent — When liable for, at all events — When not sufficient. — It will thus be seen that, as a general rule, all leases or licenses contain a provision for minimum royalty or dead rent or sleeping rent, and it may be said in passing that dead rent and sleeping rent in this country, as also minimum rent, as used in some of the leases, mean the same as dead rent as understood in England. By whatever name it is called, it means a fixed sum or amount which must be paid at all events, even though the royalty is paid on the basis of the product.[2] The payment of this sum, however, does not necessarily satisfy the rent and royalty in any event, the general rule being that the lessee must pay for the product actually marketed, even though it reaches beyond the amount of minimum royalty or dead rent.[3] Retaining possession requires the payment of minimum royalty, even though the lessee is mining on adjoining land as authorized by contract;[4] and

Co. (Tenn.), 62 S. W. Rep. 163; *post*, § 1265.

[1] Jackson Iron Co. v. Negaunee Iron Co., 65 Fed. Rep. 298.

[2] Simpson v. Ingoldsby, 27 L. T. (N. S.) 695; Wheatley v. Westminster B. Coal Co., L. R. 9 Eq. 538; Jeffrey v. Fairs, L. R. 4 Ch. 448; Bamford v. Lehigh Zinc & Iron Co., 33 Fed. Rep. 677; Pierce v. Tidwell, 81 Ala. 291, 2 S. Rep. 5; Watson Coal & M. Co. v. Casteel, 73 Ind. 296; Bloomfield Coal & M. Co. v. Tidrick, 99 Iowa, 83, 68 N. W. Rep. 570; Swan v. Brown, 8 Kan. App. 505, 56 Pac. Rep. 141; Gilmore v. Ontario Iron Co., 86 N. Y. 455, affirming s. c., 22 Hun, 391; Sciote Co. v. Pond, 38 Ohio St. 65; Powell v. Burrows, 54 Pa. St. 329; Bannan v. Miller, C. P., 19 Pa. Co. Ct. Rep. 244; Malcomsen v. Wappoo Mills, 85 Fed. Rep. 907.

[3] Watson Coal & M. Co. v. Casteel, 73 Ind. 296; Todd v. Stambaugh, 37 Ohio St. 469; Chase v. Knickerbocker Phosphate Co., 53 N. Y. S. 220, 32 App. Div. 400; Gilmore v. Ontario Iron Co., 86 N. Y. 435; McKnight v. Kreutz, 52 Pa. St. 232. See also Central Apallachian Co. v. Buchanan, 73 Fed. Rep. 1006.

[4] Lennox v. Vandalia Coal Co., 66 Mo. App. 560.

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it has been held that rent or royalty on the output marketed is recoverable even after the payment of minimum rent,[1] and that minimum rent is a silent rent, unless otherwise expressed in the contract, and, if paid by way of royalty payments, the contract is satisfied. There are some cases supporting the doctrine that excessive payment for any one year may be credited on another year,[2] but manifestly, in the absence of contract, that rule can only apply to flat or dead rent, as we shall see in the next section.

§ 1261. Conflicting doctrine — Payable out of any year. The New York court of appeals, in holding that the rent or royalty paid in excess during any one year might be credited on any other year, used these words: "The lease secures payment by royalty as rent, and then, in default of royalty measured by production, stipulates for rent in money. The whole intention of the parties was to provide for a certain amount of rent, and when that is paid, no matter when it is paid, the obligation of the lessee ceases. The remaining sentence of the same provision gives equal latitude and relief to the lessee when he has paid so much royalty upon coal mines as will cover the rent called for, whether the royalty is paid in one year or in different years, having regard only to that division into periods which the parties themselves arranged for. This construction works no injustice to the lessors. They have received the rent, which was made payable whether the coal was mined or not. It has been paid in one of the two ways bargained for. If more was expected other provisions should have been inserted in the lease. So far as that instrument discloses the intention of the parties it has been fully carried out, and

[1] Lehigh & Wilkesbarre Coal Co. v. Wright, 177 Pa. St. 387, 35 Atl. Rep. 519.

[2] Lehigh & Wilkesbarre Coal Co. v. Wright, 7 Kulp, 434; Render v. McHenry Coal Co. (Ky.), 14 S. W. Rep. 678; Garman v. Potts, 26 W. N. C. 305, 19 Atl. Rep. 1071; Richardson v. Downs (Ky.), 16 S. W. Rep. 84.

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the plaintiffs properly held to have no cause of action. A different result would lead to a double payment."[1]

But in the court of chancery appeals in Tennessee, in a case where a lease was made for a certain number of years at a certain rate per cubic yard for the marble quarried, and not less than two hundred dollars for any year, and where payment of deficits was to be in the nature of advanced royalties, and deducted from other royalties as they became due whenever they exceeded the minimum amount, and where, notwithstanding payments had been made on actual productions exceeding the minimum sum, and a deficiency occurred in a particular year, it was held that the lessee must pay the full amount of minimum rent that year, and might reimburse himself out of future excessive productions, but could not be credited for past excessive payments made in accordance with the contract.[2] This seems to be the true rule in such cases.

§ 1262. Exhausted premises — Dead rent not recoverable when paid under mutual mistake — Failure of consideration.— Under a lease of lands supposed to contain valuable coal deposits, providing that if the lessee finds coal in such lands he shall mine a minimum number of tons annually, or shall pay a certain sum as royalty whether such coal is mined or not, and he failed for several years to prospect said lands, but paid the amount specified as minimum royalty thereon, he cannot afterwards recover back the amount so paid on the ground of mutual mistake at the time of executing the lease.[3] This principle has been recognized elsewhere.[4] Again, in an action to recover the sum agreed to be paid for the right to enter upon the plaintiff's land to

[1] McIntyre v. McIntyre Coal Co., 105 N. Y. 264, 11 N. E. Rep. 645, affirming 40 Hun, 638; Render v. McHenry Coal Co. (Ky.), 14 S. W. Rep. 678; Richardson v. Downs (Ky.), 16 S. W. Rep. 84.

[2] Smith v. Godfrey (Tenn. Ch. App.), 48 S. W. Rep. 308.

[3] Bloomfield Coal & M. Co. v. Tidrick, 99 Iowa, 83, 68 N. W. Rep. 570.

[4] Jeffreys v. Fairs, L. R. 4 Ch. Div. 448; Wonsettler v. Andrews, 58 Ohio St. 551, 51 N. E. Rep. 168; Swan v. Brown, 8 Kan. App. 505, 56 Pac. Rep. 141.

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explore for coal and to mine and remove the same at an agreed price per ton, money paid by the defendant as annual rent for coal prior to the commencement of mining operations, and intended by the parties as compensation for the postponement of such operations, will not be credited upon the agreed price of the coal when removed, though the language of the instrument upon which the action is founded be appropriate to pass a present title to the coal.[1] Nor can the plea of failure of consideration be maintained.[2]

§ 1263. No duty to pay after exhaustion — Distinction between lease and sale.— The principal distinction between a lease and a sale as understood by the Pennsylvania courts seems to be that where the compensation provided for is so much per ton, with a dead rent reserved, it is a lease,[3] while on the other hand, where there is an absolute demise of all the coal under a particular piece of land with the right of entry and removal for a fixed price, it is generally construed as a sale.[4] Of course the intent of the parties is controlling in any case, and even specific characteristics of one kind or the other will not override the intent. Where the contract is a lease requiring the lessee to mine a certain number of tons of coal or ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such amount, to pay the minimum rate at all events, it has been held that it imposes no obligation upon the lessee to pay for such stipulated quantity after the coal or ore becomes exhausted.[5]

[1] Wonsettler v. Andrews, 58 Ohio St. 551.

[2] Bamford v. Lehigh Zinc & Iron Co., 33 Fed. Rep. 677; affirmed, Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665.

[3] Offerman v. Starr, 2 Pa. St. 394; Greenough's Appeal, 9 Pa. St. 18; Watson v. O'Hern, 6 Watts, 362; Griffin v. Fellows, 81 Pa. St. 114; Gartside v. Outley, 58 Ill. 310.

[4] Fairchild v. Fairchild (Pa.), 9 Atl. Rep. 255; Stoughton's Appeal, 88 Pa. St. 198; Scranton v. Phillips, 94 Pa. St. 15; Sanderson v. Scranton, 105 Pa. St. 469; Delaware, L. & W. Ry. Co. v. Sanderson, 109 Pa. St. 583, 1 Atl. Rep. 394; Hope's Appeal (Pa.), 78 Cent. Rep. 873, 3 Atl. Rep. 23.

[5] Ridgely v. Conewago Iron Co., 53 Fed. Rep. 988. See Moon v. Pittsburgh Plate Glass Co., 24 Ind. App. 34, 56 N. E. Rep. 108. Nor

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§ 1264. Not bound to dig new pits — Minimum rent the essence of the agreement.— Where the minimum rent was seven hundred and twenty pounds per annum, to be increased to one thousand pounds in case pits were sunk upon the estate, and the lessee mined small quantities of coal through adjoining works, under a covenant to work the mine uninterruptedly, efficiently and regularly, according to the usual and most improved practice, it was held that there was no obligation to sink new pits so long as the minimum rent was paid.[1]

§ 1265. Pay for coal taken out — May not remain idle — Suspension — Eviction.— The covenant for rent for coal mined is distinct from the covenant to mine a certain quantity. Where the lessee stipulated that he would pay for the coal taken out, and also that he would mine a certain number of tons annually, and where the coal left was of greater value to the lessor at the end of the lease than if it had been taken out, it was not a ground for reducing the claim for breach to nominal damages, nor can the value of such coal be recouped.[2] One of the reasons for this is, that the lessor is entitled to his rent, and it is no answer to say that the coal is there untouched, any more than it would be for a tenant to say after he had occupied a house, "It is in as good condition as when I went into it." But where ejectment had been brought by the lessor to try the question of forfeiture under a provision of the lease which forbade the tenant to let the mine stand idle for a year,

where developments fail to disclose ore. *Ante*, § 1259. Compare Bamford v. Lehigh Zinc & Iron Co., 33 Fed. Rep. 677, and cases, 679; Carr v. White Breast Fuel Co., 88 Iowa, 136, 55 N. W. Rep. 205 (turned upon the ground of mutual mistake). See as to main point, Gaines v. Virginia & A. C. Co., 124 Ala. 394, 27 S. Rep. 477; Kenton Gas, etc. Co. v. Orwick, 21 Ohio C. C. Rep. 284.

[1] Wheatley v. Westminster Coal Co., L. R. 9 Eq. 538. See also Tiley v. Moyers, 25 Pa. St. 397; Diamond Plate Glass Co. v. Fennell, 22 Ind. App. 132, 52 N. E. Rep. 168; Van Meter v. Chicago, etc. Coal Co., 88 Iowa, 92, 55 N. W. Rep. 106.

[2] Powell v. Burroughs, 54 Pa. St. 329, 8 M. R. 531.

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in which they failed, damages therefor could not be allowed by the jury in an action for the rent; but for the estrepement brought by them, which interrupted the mining operations, damages were properly allowed by the jury under charge of the court.[1] An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises. The rent already accrued and earned is not forfeited by the eviction; but in an action for such rent, the tenant may offset the damages caused by it.[2] Where a lessee, under a lease allowing him both to farm and to mine, is prevented from exercising the right to farm, it is an eviction, and such eviction is a good plea to an action for breach of the covenants of the lease;[3] and there may be repeated actions for repeated breaches.[4]

§ 1266. Royalties referable to and payable out of marketable product.— It seems well settled that royalties are referable to and payable only on the marketable product. Where this is the contract, and there is no dead rent reserved, the general rule seems to be that coal or dirt thrown upon the refuse pile of a coal-dump are in general the property of the lessee by reason of his purchase of the coal in place, under the Pennsylvania doctrine, and he is not chargeable with royalty thereon under the decisions of that state, and under such a contract, even though he may put it to a beneficial use.[5] So, in a case in Illinois under a lease providing for royalty on "all coal mined," it was held that it did not extend to coal used under the mine boilers.[6] Of

[1] Tiley v. Moyers, 43 Pa. St. 404, 4 M. R. 320.

[2] Tiley v. Moyers, *supra*.

[3] Walker v. Tucker, 70 Ill. 527, 8 M. R. 672. See Gaines v. Va. & A. Coal Co., 124 Ala. 394, 27 S. Rep. 477.

[4] Watson v. O'Hearne, 6 Watts, 362, 8 M. R. 333.

[5] Lehigh Valley Coal Co. v. Wilkesbarre & Erie Ry. Co., C. P., 8 Kulp, 540; Lance v. Lehigh W. Coal Co., 163 Pa. St. 84, 29 Atl. Rep. 755; Hoyt v. Kingston Coal Co., 10 Kulp, 15. See also Genet v. Delaware & H. Canal Co., 163 N. Y. 173, 57 N. E. Rep. 297.

[6] Cons. Coal Co. v. Rainey, 69 Ill. App. 182. See also Dunham v. Haggerty, 110 Pa. St. 560, 1 Atl. Rep. 667.

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course the rule applies with certainty where the lease expressly provides for royalty upon screened coal, which means the customary screen, in the absence of a specification.[1] But the reason of the rule in the first cases mentioned is somewhat obscure, under leases providing for a royalty upon "all coal mined," and, as we shall see in the next article of this chapter, where he puts the entire product to some beneficial use the lessee should be made to pay royalty upon it.[2] If this rule will work hardship in isolated cases, the lessee may protect himself by appropriate stipulations in the lease.

§ 1267. Same subject — Graduated rate — Produced but not marketed.— While it would be competent to agree upon a postponement of royalty on mineral ore or stone or coal produced and not marketed, in the absence of such stipulation and where the royalty is payable out of the marketed product, it has been held that the lessor cannot recover his rent for that produced but not shipped.[3] Proof of custom, including the size of customary screen, can always be made in the usual way. But dimension stone is a phrase of technical meaning, which meaning should be proven by witnesses familiar with it, and it is error to submit its meaning to the jury.[4]

§ 1268. "Expense of winning" defined.— What we have elsewhere said as to net proceeds[5] applies with equal force here. If parties do not desire that their contracts should be construed according to the custom of the vicinage they should make ample provision to the contrary. In England it is sometimes customary to make the expense of winning, that is, producing the coal, one of the expenses to be paid before the royalty becomes chargeable; that is, before the

[1] Dunham v. Haggerty, 110 Pa. St. 560.

[2] Doster v. Friedensville Zinc Co., 140 Pa. St. 147, 21 Atl. Rep. 251.

[3] Crawford v. Oman & Stewart Stone Co., 34 S. C. 90, 12 S. E. Rep. 929; Harlan v. Central Phosphate Co. (Tenn.), 62 S. W. Rep. 614.

[4] Crawford v. Oman & Stewart Stone Co., *supra*.

[5] *Ante*, §§ 1253, 1258.

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basis of it is ascertained. Thus, where the rent or royalty was payable after the expense of winning, and more than one seam was included in the lease, it was held that the expense of reaching the second seam was properly chargeable before the royalty could be exacted. Also that coal is won only when full, practicable, available access is given to it, viewing the different veins as one mine, so that the actual production of the coal becomes possible.[1] This principle turns wholly upon the terms of the contract and the customs of the particular vicinage, and has little or no application, as we have seen, in this country.[2]

§ 1269. Custom in interpreting a lease.— Custom being an existing condition in a community or country, having in itself the force or effect of law, is often appealed to for the purpose of aiding in the settlement of law actions in the courts. But, as we have seen, a custom to be of any value must be reasonable, and of uniform operation within the district where it exists, and this applies as well to the matter in hand as it does to district rules. Thus, where the plaintiff conveyed to the defendant the right to mine and take coal from the land of the plaintiffs on the payment of a certain royalty on every ton of screened coal thus taken, in an action to recover for coal taken by defendants the evidence established that they had taken two kinds of coal, one such as passed over a screen of the kind and fineness of the screens in common use in the valley, which coal had been paid for; the other kind was coal screened over a much finer screen, and plaintiffs sought to recover for this. The court decided that the words "and screened coal" used in the lease were used in the sense in which they were commonly used in the community, and that the defendants could not avoid paying royalty on the second kind of coal by omitting the proper screen.[3] So, it is customary in the Joe Daviess lead mining

[1] Rokeby v. Elliott, L. R. 13 Ch. 277, citing Lewis v. Fathergill, L. R. 5 Ch. 103. See also Stenhouse v. Harris, 5 L. T. (N. S.) 635.

[2] See *ante*, §§ 1253–1258.

[3] Dunham v. Haggerty, 110 Pa. St. 560, 1 Atl. Rep. 667; Stoddard v. Emery (Pa.), 18 Atl. Rep. 339.

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district for miners mining on land without any agreement, to pay a royalty of one-sixth of the mineral raised, and this is controlling.[1] But the lessee is not bound by a private custom of the lessor in regard to his mines.[2]

§ 1270. No rent due until possession taken.—In general no obligation to pay rent arises until some part of the land is actually occupied under a mining lease which provides that the lessees shall begin within a year and pay a fixed sum annually so long as any part of the premises is occupied by them.[3] And where the lessee has the option and right reserved in the lease of surrendering at any time the possession of the premises, there is no obligation to pay any rent until operations are actually commenced, and none thereafter upon surrendering possession.[4] So, where the payment of royalty is by the contract made dependent upon favorable circumstances of market and shipping, royalties are not payable where the lessee is prevented from marketing by unforeseen circumstances.[5] It has also been held that a waiver for a number of years of strict enforcement of royalty covenants, under such circumstances as to inaugurate a custom, does not authorize the heirs of the lessor to forfeit the lease when operated according to custom.[6] But otherwise, and independent of such circumstances, a waiver does not extend to representatives.[7] Nor does a reduction in price and waiver of performance extend to a renewal of a lease unless expressed.[8]

[1] Alderson v. Ennor, 45 Ill. 128, 8 M. R. 526; Allen v. Barkley, 1 Speer's Eq. (S. C.) 264, 14 M. R. 246.

[2] Beatty v. Gregory, 17 Iowa, 109, 9 M. R. 234.

[3] Richardson v. Downs (Ky.), 16 S. W. Rep. 84; Reed v. Beck, 66 Iowa, 21, 23 N. W. Rep. 159.

[4] Brooks v. Kunkel (Ind.), 57 N. E. Rep. 260.

[5] Given's Ex'rs v. Providence Coal Co. (Ky.), 60 S. W. Rep. 304.

[6] Hosford v. Metcalf (Iowa), 84 N. W. Rep. 1054.

[7] Wright v. Warrior Run Coal Co., 182 Pa. St. 542, 38 Atl. Rep. 491.

[8] Cons. Coal Co. v. Rainey, 69 Ill. App. 182.

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§ 1271. Circumstances excusing the payment of minimum rent.— There are circumstances and cases where the payment of the minimum royalty has been excused, as where the mine becomes unworkable, which would be the case where there were successive faults being found in the coal mine, or where the coal is exhausted, or the other product, such as the iron or precious metal ores, become either exhausted or unproductive in value. For example, a mining lease requiring the lessee to mine four thousand tons of ore annually and pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposes no obligation upon the lessee to pay for such stipulated quantity after the ore in the demised premises has become exhausted.[1] It has been held that under a lease providing for a minimum annual rental in case of failure to mine the specified quantity, the lessee is entitled to credit for the excess paid in advance for coal not mined;[2] and he is not relieved on two leases where he pays in full on one, there being two veins of ore, it not being considered, in such case, that the two are merged.[3]

§ 1272. Further as to minimum royalty — Meaning of miner's weight.— What we have said regarding royalty in a general sense covers this question, but there are a few special matters worthy of notice. The owner of leases for the purpose of mining for oil, for a paid consideration, assigned them to the defendant; the agreement stipulated the further consideration that if the defendant should operate under the leaseholds, and should pay one hundred dollars for each lease if oil should be found in paying quantities, or that he might pay one thousand dollars for the whole. In

[1] Ridgely v. Conewago Iron Co. (C. C.), 53 Fed. Rep. 988; Gowan v. Christie, L. R. 2 Sc. App. 273, 8 M. R. 688; Jones v. Sheares, 7 C. & P. 346, 8 M. R. 333; Ridgway v. Sneyd, 1 Kay, 627, 8 M. R. 414; Bute v. Thompson, 13 M. & W. 537, 8 M. R. 371; Higgins v. California Petroleum Co., 109 Cal. 304, 41 Pac. Rep. 1087.

[2] Lehigh Coal Co. v. Wright, 7 Kulp, 154. See *ante*, § 1260, note 2, p. 1008.

[3] Drake v. Laco, 157 Pa. St. 17, 27 Atl. Rep. 358. See *post*, § 1275.

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a suit brought by plaintiff as lessee under the original lease, and the lessor of the defendant, the court held that the defendant did not become liable where he failed to operate for oil under the leases, but surrendered them and took new leases from the owner of the land.[1] And where a contract provides for a certain rate per ton to be paid for ore taken from the premises, and also provides a nominal sum as rent for land to be used for mills, etc., the former cannot be recovered as rent.[2] The lessee is often bound to pay minimum rent at all events. Thus, where a lease was entered into as the result of experiments by drilling, which seemed to indicate the presence of a large vein, but upon development "faults" and "horsebacks" were frequently encountered, which rendered it unprofitable to mine, all of which was set up in an answer in an action for royalties, it was held that it constituted no ground for relief, and that the defendants must pay the minimum rent, and could not set up abandonment so long as they continued in possession.[3] And where the term "miner's weight" was used as the basis of payment of royalties, it was held to mean a ton of prepared coal, after eliminating therefrom all "bones," slates, and unmarketable material.[4]

§ 1273. Lien for royalties.—In some of the mining regions it is customary to insert in a lease a provision giving the lessor a lien upon the output for royalties, and under such circumstances it has been held that the lien is not waived because the lessee disposes of the ore, even though it is disposed of in the customary way, and the wrongful disposition of the ore by the lessee gives the lessor his action on the case as for damages in consequence thereof.[5] In some states the lessor has a special lien given by statute. There

[1] Smith v. Munhall, 139 Pa. St. 253, 21 Atl. Rep. 735.

[2] Jackson Iron Co. v. Negaunee Concentrating Co., 65 Fed. Rep. 298, 12 C. C. A. 636.

[3] McDowal v. Hendrix, 67 Ind. 513, 9 M. R. 96.

[4] Drake v. Laco, 157 Pa. St. 17, 27 Atl. Rep. 538.

[5] Iron Duke Mine v. Brasstad, 112 Mich. 79, 70 N. W. Rep. 414.

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is much innate justice in these statutory provisions, and as remedial statutes, in the absence of laches on the part of the lessor, they should be extended to the fullest possible limit, for the reason that in equity at least the ore mined upon even the severed estate belongs to the other estate, that is, the lessors, until it is paid for. True, the lessee has absolute right to go upon the land and remove it, but its removal is, *pro tanto*, a destruction of the estate. And inasmuch as the estates may become merged again, the lessor, or owner of the servient estate, has at least an equitable right that the estate shall not be so wasted without compensation to him. It has been held that in case of receivership and insolvency, these statutory liens are entitled to a preference, and the justice of this is manifest.[1]

§ 1274. State's action on royalty bond.— In some of the older states, that is, the first thirteen, notably South Carolina and New York, state mineral lands are sometimes worked under licenses or leases whereby the state secures a revenue in the form of royalties, and to secure the payment of these royalties the statutes provide for the execution of a bond conditioned that the royalties will be seasonably and properly paid. In an action on a royalty bond in South Carolina the return made under general laws to the state officer by the lessee showed that he had mined a certain number of tons of phosphate rock and shipped it to a specified company, but the price of the royalty was not filled in nor the amount thereof, while the name of the ship and its captain were given, and it was held that his return was conclusive and sufficient upon which to base an action upon a royalty bond.[2]

[1] Malcomson v. Wappoo Mills, 85 Fed. Rep. 910, citing (*q. v.*) Longstreth v. Pennock, 20 Wall. 576; In re Trim, Fed. Cas. 14,174, 24 Fed. Cas. 197, 2 Hughes, 355; In re Wynne, 30 Fed. Cas. 752, Chase, 227, 4 N. B. R. 23; Lambert v. Desaussuer, 4 Rich. Law, 248. See also Coaldale M. & Mfg. Co. v. Clark, 43 W. Va. 184, 27 S. E. Rep. 294.

[2] State v. Seabrook, 42 S. C. 74, 20 S. E. Rep. 58.

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§ 1275. Each operation distinct—No right to mix product of different mines.— It has been held in Pennsylvania, where a lessee was working two mines belonging to the same lessor, that this did not give him the right to mix the accounts. The lessor has the right to have each mine worked according to the contract, and payment in full on one does not satisfy any part of the other; nor are the expenses of one chargeable to the other.[1] But in an English case, where coal was taken from one colliery by the outstroke through another colliery, and a *pro rata* tax paid on both, it was held that the expense of the engines need not be separated and charged to each.[2]

§ 1276. Summary—The doctrine of this article restated. The word "royalty" seems to have been derived from the rent or tax payable to the crown or sovereign for the operation of royal mines. In its most commonly accepted sense it means the compensation payable for the use of mining premises and payable either in kind, that is to say, the material produced in its original form, or in a cleaned and marketable form, or by way of money rent for the use of the premises. It is usually payable on the basis of net proceeds, which, as a general rule, means the marketed proceeds after certain stipulated or customary charges are first paid.

As a general rule the royalties paid on the basis of the output are paid in three ways: (a) the net proceeds, which ordinarily means the price received after deducting freight and treatment charges only; (b) a flat per ton rate based on the actual output of the mine, which means the entire output; and (c) a rate per ton based upon the product of a certain character, which means either the actual marketed product, or that which can be marketed, that is, that which is of a certain size in the case of coal, or a certain value in the case of other products.

[1] Drake v. Laco, 157 Pa. St. 17, 27 Atl. Rep. 538. See *ante*, § 1271.

[2] Senhouse v. Harris, 5 L. T. (N. S.) 635, 8 M. R. 507.

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Besides these modes of compensation, there is generally provided for, and not customary unless provided for, a certain compensation known as dead rent or sleeping rent, or silent rent, all meaning substantially the same thing, which is a fixed compensation for the use of the land, whether used or the product is taken from it or not.

In general no rent of any kind is payable, in the absence of stipulation to the contrary, unless possession is taken and operations commenced in pursuance of the lease. However, the lease becomes a living contract between the parties, and if it provides for dead or sleeping rent the lessor is entitled to that, under any and all circumstances, and may forfeit the lease for its non-payment. But where operations have been commenced and a fixed period of time is provided, or where the lease is to continue until a certain vein is mined out, mere non-payment of the money or dead rent may, as a general rule, be relieved against by payment of the same before an eviction. All these covenants are for the benefit of the lessor, and, of course, he may waive them like any other right, and under the same circumstances. Likewise, the waiver of one does not constitute the waiver of another, nor does the waiver extend to the representatives of the lessor.

As a general rule, unless the contract is in form such as to require the payment of a fixed sum within a given time, or the production of a certain quantity in the same way, dead rent may be paid out of the proceeds of any year, unless there are stipulations in the lease to the contrary. But if the lessee is permitted to offset dead-rent payments against the price of the material produced and payable as royalty, he must usually look to the future for compensation.

In some states the lessor is given a lien for his rent. This lien is in all cases a superior one, and is not affected by the bankruptcy of the lessee.

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Article E.

Covenants, Conditions and Provisos Generally.

§ 1281. Covenants in general — The intent.
1282. Covenants special and peculiar considered.
1283. Same—Abandonment of covenants—When operative and when not.
1284. Miscellaneous covenants.
1285. What construed as a breach.
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1298. "Instroke," definition — When proper meaning.
1299. "Instroke," an exceptional case controlled by the contract.
1300. As to payment of taxes.
1301. Lessee's right to quiet enjoyment.
1302. Summary.

§ 1281. Covenants in general — The intent. — The general covenants to be observed, which should be, and usually are, reserved in the instrument itself, are for quiet enjoyment on the part of the lessor, for properly working, for not doing any act to occasion waste or drowning of the mine, for proper timbering, and for the payment of rent or royalty, on the part of the lessee.[1] Conflicting covenants

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 209, 211; Griffiths v. Rigby, 1 H. & N. 237, 27 E. L. & E. 519; Severn v. Clark, 2 Leon. 122: Shaw v. Stenton, 2 H. & N. 858; Hollis v. Carr, 2 Mod. 87; Duke of Northumberland v. Errington, 5 T. R. 526; Saltoun v. Houston, 1 Bing. 433; Sampson v. Easterby, 9 Barn. & C. 505, 1 Cromp. & J. 105;

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may sometimes occur in a lease, and the rule applied in such case is that the whole must be construed together, and sweeping clauses controlled by the special.[1] The intent, after all, must govern, and the instrument be so construed as to accomplish this result, if it can be gleaned from the instrument with the assistance authorized by law.[2]

§ 1282. Covenants special and peculiar considered.— D., who was engaged in mining coal from two tracts of land through a single main entrance from which lateral galleries were constructed, leased to plaintiff the right to mine from one tract, plaintiff agreeing to pay one-half the expenses of repairing any part of the property used or enjoyed by him except the main entrance. Afterwards another entrance was constructed and plaintiff paid half the expenses, and later sought to recover therefor, claiming to have paid the same by mistake and coercion, and the supreme court of West Virginia held that the contract referred only to the existing entry and plaintiff was bound for one-half the cost of the new one.[3]

Wood v. Copper Miners Co., 7 C. B. 906; Jones v. Shears, 7 C. & P. 346, 32 Eng. C. L. 649; Wheatley v. Westminster Coal Co., L. R. 9 Eq. 538; Maloney v. Love, 11 Colo. App. 288, 52 Pac. Rep. 1029; Cons. Coal Co. v. Schaeffer, 135 Ill. 210, 25 N. E. Rep. 788; Davis v. Moss, 34 Pa. St. 346; Stoddard v. Emery, 128 Pa. St. 436, 18 Atl. Rep. 339; Galey v. Kellerman, 128 Pa. St. 491, 16 Atl. Rep. 474; Bradford Oil Co. v. Blair, 118 Pa. St. 83; McKnight v. Mfg. Nat. Gas Co., 146 Pa. St. 185; Ohio Oil Co. v. Kelly, 9 Ohio C. C. 511.

[1] Rolliston v. New, 4 Kay & J. 640; Fogus v. Ward, 10 Nev. 269; McCurdy v. Alpha G. & S. M. Co., 3 Nev. 27; Wood v. Copper Miners Co., Bl. & Weeks' Lead. Cas. Mines, p. 424; Doe d. Meyrick v. Meyrick, 2 Cromp. & J. 229; Maloney v. Love, *supra*.

[2] Duffield v. Michaels (C. C. A.), 102 Fed. Rep. 820; Bainb. Mines (1st Am. from 3d Lond. ed.), p. 209; Holder v. Taylor, 1 Rol. Abr. 518; Bush v. Coles, Salk. 106; Jackson v. Myers, 3 Johns. (N. Y.) 388; Wood v. Copper Miners Co., *supra; ante*, §§ 1202, 1233.

[3] Myer v. Marshall, 34 W. Va. 42, 11 S. E. Rep. 730. See Stoddard v. Emery, 128 Pa. St. 436, 18 Atl. Rep. 339; Stewart v. Northwestern Coal & Iron Co., 147 Pa. St. 528, 23 Atl. Rep. 882. See *ante*, § 1275.

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§ 1283. Same — Abandonment of covenants — When operative and when not. — The mere failure to enter into the performance of the covenants of a lease, even though acquiesced in by the adverse party, in the absence of writing waiving the performance, is not always sufficient to set aside the covenants of the lease. Thus, an oil lease, after certain provisions giving the lessees the right to enter and drill, upon paying a royalty and a sum of money, working operations to commence and a well to be sunk and completed within fixed periods, stipulated that on failure to comply they should pay a fixed sum per year during such delay; it was further covenanted that if they failed to comply or to make the annual payment within the time mentioned, the lease should be void. They neither commenced operations nor made any payment within the agreed time, but in an action to enforce the covenants and recover damages for the breach, the court decided that the lease was not null *ab initio*, but only from the expiration of the time within which the payment was to be made, and that the lessees were liable for damages sustained by reason of their breach of the covenants.[1] This, of course, was controlled by the principle that the lessees could not thus take advantage of their own laches, a principle controlling in this as well as in all other transactions. But where a lease provides for the drilling of one oil well in eight months, and a second at a time not specified, there is no implied covenant to drill wells as often as customary, in the absence of an express contract.[2] And so, where the only consideration for the lease of lands supposed to contain minerals is the testing and working of the land by the lessee within a specified time, the exploration to ascertain the presence of minerals should be substantially and thoroughly made, and this provision is not satisfied by superficial examination by an expert.[3]

[1] Galey v. Kellerman, 123 Pa. St. 491, 16 Atl. Rep. 474.

[2] Stoddard v. Emery, 128 Pa. St. 436, 18 Atl. Rep. 339.

[3] Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 881, 18 S. W. Rep. 65.

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§ 1284. Miscellaneous covenants.—A provision in a lease of a coal mine that the passageway, as cut through the coal, shall be used for mining the coal only, and no other, is a valid limitatiou upon the lessee's estate, and its breach will be enjoined.[1] A lease, after giving a company the exclusive right to test, open, mine and remove the coal from certain lands, and to abandon the same if the coal should not prove profitable to work, continued as follows: "It is not the intention or expectation (of the parties) to enter on the surface of any of the lands covered by this lease, but to work the coal through the now-existing shafts, reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it profitable to do so." It was held that there was no obligation on the part of the lessee to open new shafts before exercising its judgment to abandon, but an obligation merely to work from the existing shafts.[2]

The lease of a mine, in the absence of covenants requiring a certain amount of work, at least implies that the lessee will work the same with reasonable diligence. Thus, where a right to mine coal or other minerals is granted in consideration of the reservation of a certain portion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the lessor or grantor will derive the income which both parties had in contemplation when the contract was entered into.[3] But where nothing was done for seventeen years under a lease, it was held that it was correctly treated as abandoned.[4]

§ 1285. What construed as a breach.— In Illinois it was held by the court that a covenant by the lessee of a coal mine to work the same in a sound, safe and coal workman-

[1] Rockefeller v. Hanover Coal Co., 6 Kulp, 507.

[2] Van Meter v. Coal Co., 88 Iowa, 92, 55 N. W. Rep. 106.

[3] Kotch's Appeal, 93 Pa. St. 434, 4 M. R. 151; Sharp v. Wright, 28 Beav. 150; Barnard v. Arnold, 27 Conn. 617, 8 M. R. 478; Watson v. O'Hearne, 6 Watts, 362.

[4] Blackstone Coal Co. v. Pell, 88

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like manner, so as not to injure the works, is broken by allowing the mine to fill with water, and remain in that condition for months, where the evidence shows that the result is dangerous to the mine. Baker, J., speaking for the court, said: "To permit the mine to keep on filling up with water, and to permit the mine to remain full of water for a long period of time, thereby causing detriment to the mine, and even injury to its continued existence, was surely a breach of the covenant to work the mine in a sound, safe and workmanlike manner."[1] And it was further decided in the same case that this clause was not limited or qualified in the particular case by the words "so as not to ruin the works."

§ 1286. What not a breach — Removing machinery.— But it was held that a covenant not to do anything that would cause flooding of the mine, which the removal of its machinery would occasion, is not broken by the lessee removing machinery under a clause allowing such removal. In such case the lessor should protect himself by exercising his option to purchase the machinery.[2] So, a lessee's covenant to give up the mine in a good and workmanlike condition does not bind him for the value of a removed derrick which he at first used over a shaft, which he later abandoned for a slope.[3]

§ 1287. What is and what is not implied—When abandonment permissible.—Where the lessor let to the lessee the right to mine coal from two certain veins named in the lease at a royalty, the court ruled that they did not imply a covenant of the existence of two such workable veins.[4] So, where a lease provided that the lessee in mining said land would in all cases support the superincumbent bed of rock by sufficient

W. Va. 297, 18 S. E. Rep. 498. See also Givens' Ex'rs v. Providence Coal Co. (Ky.), 60 S. W. Rep. 804.

[1] Cons. Coal Co. v. Schaeffer, 135 Ill. 210, 25 N. E. Rep. 788. See also Murray v. Heinze, 17 Mont. 353, 42 Pac. Rep. 1057.

[2] Rolleston v. New, 1 Kay & J. 640, 8 M. R. 464.

[3] Timlin v. Brown, 158 Pa. St. 606, 28 Atl. Rep. 236; Fogus v. Ward, 10 Nev. 269.

[4] Harlan v. Lehigh Co., 8 M. R. 496, 35 Pa. St. 287; Spoor v. Green, L. R. 9 Exch. 99.

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props and sets, it was held that such covenant did not amount to a representation and assurance by the lessor that there was such a bed of rock over the coal.[1] Where a lease authorized an entry and the erection of mining machinery to carry on operations, and, if found unprofitable, provided that it might be surrendered, and the lessee covenanted to pay a certain royalty, it was held that there was an implied covenant on the part of the lessee to work the mine in a reasonable manner, and his failure so to do for a considerable period forfeited the lease.[2] A verbal modification of the covenants will not always amount to a waiver of their performance, although it may create a cause of action for any labor performed on account of such representations.[3]

§ 1288. Incidental rights.— Complainant sold the coal underlying her farm for a gross sum, and leased to the purchaser eleven acres of the surface for the term of thirty-five years, unless the coal should be sooner exhausted, in which event the lease should cease. The lease read in part: "For the purpose of enabling the lessee to sink the pits or shafts, and successfully mine and remove said coal." During the thirty-five years and before said coal was exhausted, the lessee used the leased premises for the transportation of coal mined by him on other land. In an action to enjoin such use, the court, after carefully considering the question, held that such right was incident to the lease, and that the action would not lie, and that he did not thereby violate the terms of his lease nor inflict any substantial injury upon the lessor.[4] So, it would seem that the lease vests in the lessee an interest in the land under such circumstances, and in the absence of covenant to the contrary he ought to be and is allowed to use it for every reasonable purpose not inconsistent with the purposes of the grant.

[1] Beattie v. Coal Co., 56 Mo. App. 221.

[2] Conrad v. Morehead, 89 N. C. 81.

[3] Lehigh Co. v. Harlan and Henderson, 27 Pa. St. 429, 8 M. R. 423; Hazleton Coal Co. v. Buck Mountain Coal Co., 52 Pa. St. 301, 2 M. R. 389.

[4] Cons. Coal Co. v. Schmisseur, 135 Ill. 210, 25 N. E. Rep. 795. See also Gumbert v. McCracken, 131 Pa. St. 36, 18 Atl. Rep. 1068.

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§ 1289. Covenant to pay taxes, etc.— Reprises.— Extraordinary covenants, such as payment of taxes on the lessor's property, or extraordinary imposts which are a lien upon the whole estate, must, in general, find positive expression in the lease, or the lessee will not be held liable for them.[1] But where the lease provided for a certain rent "clear of and over all taxes and reprises . . . assessed upon coal or . . . upon the surface, and also pay and bear all such imposts, taxes and reprises," and the lessee paid a sewer tax and sought to recover for such payment from the lessor, the supreme court of Pennsylvania upheld a judgment for the defendant (the lessor); the court holding that the word "reprises" includes "expenses, repairs, taxes, costs, trouble, etc.," and while the sewer tax was not in the minds of the parties, it was fairly within the terms of the comprehensive word "reprises" used by them in the lease.[2]

§ 1290. Implied covenants — When lessee may perform lessor's covenants and charge therefor—Lessor not liable for lessee's negligent mining.— Enough has already appeared herein to demonstrate that certain implied covenants, that is, those imposed by the law, are equally as binding as those which are actually expressed.[3] These covenants likewise extend equally to both parties. And, while implication may not be strong enough to enforce the general duty to repair, which must ordinarily be left to express contract, yet wherever there is a duty which the lease enjoins, or the law implies as resting upon the lessor, such as repairs or payment of taxes, or the like, the lessee has the right, if it can be done in money, to discharge such obligation and charge it to the lessor; and the converse of this rule is equally true.

[1] *Post*, § 1300; Pettebone v. Smith, 150 Pa. St. 118, 24 Atl. Rep. 693, and cases.

[2] Delaware & H. C. Co. v. Von Storch, 196 Pa. St. 102, 46 Atl. Rep. 375, citing as to reprises, Near v. Watts, 8 Watts, 319. See *post*, § 1300.

[3] Owens v. Wight, 1 W. C. R. 541; James v. Cochrane, 7 Ex. 170; Hodgkinson v. Crow, L. R. 19 Eq. 591; Copper M. Co. v. Beach, 13 Beav. 478.

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For example, in Michigan, where there was a special covenant in the lease that the lessor would put the salt works in proper repair within a given time, and failing to do so the lessee might, and the lessee made the repairs, and in an action for rent attempted to set off such claim, the trial court allowed the claim for repairs, but not the damages for delay, which judgment was affirmed by the supreme court.[1] The lessor of coal lands severed from the surface is not liable, as a general rule, to the owner of the surface for the negligent mining of the lessee, which damages the surface.[2]

§ 1291. Unreasonable provisions relieved against.— The question as to how far equity will interfere to relieve against unreasonable and unconscionable covenants seems not wholly settled, nor are the decisions harmonious, some cases holding that equity will relieve,[3] while others hold the parties to the strict letter of the covenant.[4] The better rule would seem to be that in all such cases, in the absence of fraud in procuring the condition of affairs for which relief is sought, and where the party seeking is in no way in fault, and the circumstances unforeseen, equity ought to interpose and grant the proper relief. As was said by Lord Kenyon, M. R., in a case where the plaintiff, lessee of a colliery at a fixed rate, sought relief, the colliery becoming not worth working: "A court of equity must forget its name, if it did not interfere in a case so circumstanced. The contract was . . . a contract for all the coal contained in the land at

[1] Clark v. Babcock, 23 Mich. 164. Supporting the same principle, see Clegg v. Rowland, L. R. 2 Eq. 160; Ardesco Oil Co. v. North American O. & M. Co., 66 Pa. St. 375; Fisher v. Miliken, 8 Pa. St. 111; Linn v. Gage, 37 Ill. 19; Wright v. Lattin, 38 Iowa, 295; McDowell v. Hendrix, 67 Ind. 513; Hunter v. Silk, 5 East, 449.

[2] Hill v. Pardee, 143 Pa. St. 98, 28 Atl. Rep. 815.

[3] Smith v. Morris, 2 Brown, C. C. 311, 8 M. R. 317; Huggins v. Daley (C. C. A.), 99 Fed. Rep. 606, 611. See also Duffield v. Michaels, 102 Fed. Rep. 820; Hukill v. Meyers, 36 W. Va. 629, 15 S. E. Rep. 151; Thompson v. Christie, 138 Pa. St. 249.

[4] Ridgeway v. Sneyd, 1 Kay, 627. See also Marquis of Bute v. Thompson, 13 M. & W. 487; Talbot v. Ford, 13 Sim. 173; Wilmington Star M. Co. v. Allen, 95 Ill. 288.

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9*s.* and 6*d.* per wey. Mr. Scott said if a court of equity interfered, it would not be doing justice between man and man. If it would not be so, I much mistake the nature of the object. If any possible advantage could arise to Mr. Morris, I would not interfere. It is true, if parties enter into legal contracts they are bound to fulfill them. But if parties enter into contracts which are enforced for purposes of harassment and vexation, courts of equity properly interfere."[1]

§ 1292. Non-payment of rent not ground for forfeiture or rescission.— Non-payment of rent is not always a forfeiture-bearing covenant. It is only so when the parties make it so; and if the parties merely provide a certain rent without providing for forfeiture for non-payment, a right of action for the rent but no forfeiture accrues to the lessor for non-payment.[2] In the principal case the only forfeiture provided for was for abandonment, and it was held that the lessor could not even rescind for non-payment of rent.[3]

§ 1293. When rescission permitted.— Where an owner makes a lease of valuable mineral lands in consideration of the establishment of manufactories thereon and the payment of certain royalty, and the lessee fails to work the mineral or erect manufactories, but agrees with others so to do, against the terms of the lease, the lessor may rescind the contract.[4]

§ 1294. To test and work — When violated — Construction.— What will satisfy the covenant to "test and work," or its equivalent, in a lease, has been made the subject of no

[1] Smith v. Morris, 2 Brown, C. C. 811, 8 M. R. 317. See Phillips v. Jones, 9 Sim. 519; Indianapolis Gas Co. v. Teters, 15 Ind. App. 475, 44 N. E. Rep. 549.

[2] Marshall v. Forest Oil Co. (Pa.), 47 Atl. Rep. 927. See Hooks v. Forst, 165 Pa. St. 236, 30 Atl. Rep. 846; Aye v. Philadelphia Co., 193 Pa. St. 451, 44 Atl. Rep. 555. See also § 1217, *ante*.

[3] Marshall v. Oil Co., *supra*. And this was the holding of the Pennsylvania case cited *ante*, § 1217.

[4] Oliver v. Goetz (Mo.), 28 S. W. Rep. 441. See also Kille v. Reading

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little controversy. Ordinarily the lease must explain itself; but there must, in good faith, be an actual commencement.[1] But the covenant to "test and work," as also the covenant to "fairly work," "mine to best advantage," and kindred covenants, must depend largely upon the language employed. No hard-and-fast rule can be set;[2] though it may safely be said that as a rule, where a lease contains a covenant for work as far as it ought to be worked, the lessee is not bound to work at a loss.[3] The testing should be so thoroughly done as to leave no doubt as to the presence or absence of minerals, and not only this, but their commercial value or the want of it, if present, should be demonstrated, and all should be done in good faith.[4]

§ 1295. Covenant to timber, and for proper mining.— The covenant to timber, leave pillars and prevent drowning, so essential to the preservation of the mine, should be rigidly enforced. Where, under a general rule requiring work to be done in a proper and workmanlike manner, under verbal leases, plaintiff was stopped in his work by defendant's agent, the court decided that it would not be warranted in holding that he forfeited all rights under his lease, simply because he failed to put in sufficient timbers,

Iron Works, 141 Pa. St. 430, 21 Atl. Rep. 666; Smith v. Munhall, 139 Pa. St. 253, 21 Atl. Rep. 735.

[1] Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. Rep. 65; Jones v. Sheares, 7 Car. & P. 346; Barnard v. Roane Iron Co., 85 Tenn. 139, 2 S. W. Rep. 21; Torney v. Ward (Tex.), 62 S. W. Rep. 108.

[2] Rolleston v. New, 4 Kay & J. 640; Owings v. Emery, 6 Gill (Md.), 260; Watson v. O'Hearne, 6 Watts, 362; Ridgeway v. Sneyd, 1 Kay, 627; Mellers v. Duke of Devonshire, 16 Beav. 252; Jervis v. Tompkinson, 1 H. & N. 195; Garman v. Potts, 138 Pa. St. 506, 19 Atl. Rep. 1071.

[3] Jones v. Sheares, 11 C. & P. 346; Bainb. Mines (1st Am. from 3d Lond. ed.), 265; Clark v. Midland Blast Furnace Co., 21 Mo. App. 58; Hanson v. Boothman, 13 East, 22; Walker v. Tucker, 70 Ill. 527; Gowan v. Christie, L. R. 2 Sc. App. 273. Compare Phillips v. Jones, 9 Sim. 519; Talbot v. Ford, 13 id. 173; Marquis of Bute v. Thompson, 13 M. & W. 487; Palmer v. Wallbridge, 15 Can. Sup. Ct. 650.

[4] Petroleum Co. v. Coal & Coke Co., *supra;* Conrad v. Morehead, 89 N. C. 31.

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especially where that was a disputed fact.[1] The covenant for proper mining, standing alone, is very broad and comprehensive and might be difficult of exact meaning in a given case. Where there was a demise of all mines of coal and iron stone which had then been, or should thereafter be, discovered under certain lands, at a yearly rent, payable whether the mines were worked or not, and at tonnage rents, the lessee covenanting to work the mines in a proper manner, it was held that, in order to show any breach of the covenant in not working, it was necessary that the mines should have been discovered or opened.[2] The duty, obligation and covenant for proper supports and timbering are founded upon the necessity of protecting the surface and at the same time protecting the mine from caving. What has already been said upon the question of surface support, therefore, applies here.[3]

§ 1296. Drainage rights specially — Filling with water — Flooding.— In an Illinois case where the defendant succeeded to its rights by a master's sale in chancery, wherein plaintiff's rights as lessor were fully protected under the terms of the lease as to all future acts, the lease containing a covenant that the lessees "shall work the mine in a sound, safe and workmanlike manner, so as not to ruin the works, and leave necessary pillars and prop up the work securely;" and wherein the court instructed the jury that under the lease it was the duty of the lessees, and those

[1] Ruffatti v. Societe Anonyme Des Mines De Lexington, 10 Utah, 396, 37 Pac. Rep. 591. See also No. 5 Mining Co. v. Bruce, 4 Colo. 293.

[2] Bainb. Mines (1st Am. from 3d Lond. ed.), 230; Quarington v. Arthur, 10 M. & W. 335; Phillips v. Jones, 9 Sim. 519; Mellers v. Duke of Devonshire, 16 Beav. 252. See also Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. St. 429.

[3] Hodgson v. Moulson, 18 C. B. (N. S.) 332, 114 Eng. C. L. 330; Glasgow v. Hurlet Alum Co., 8 H. L. Cas. 25; Dugdale v. Robertson, 3 Kay & J. 697; Shaw v. Stenton, 2 H. & N. 358; Randolph v. Halden, 44 Iowa, 327; Thomas Iron Co. v. Allentown M. Co., 28 N. J. Eq. 27; Trout v. McDonald, 83 Pa. St. 144; Owens v. Wight (not reported), 1 W. C. R. 451.

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claiming under them, to work the mine in a sound, safe and workmanlike manner so as not to ruin the works; and where the evidence showed that the mine had been allowed to fill with water, the court, in upholding a judgment in favor of the lessor in forcible entry proceedings, held that this duty was imperative, and that it was not necessary, in order to violate the covenants so as not to ruin the works, that there be an utter destruction, but that serious impairment of the works, and anything which would essentially promote their injury, decay or destruction, would support the judgment.[1]

Under a grant of a vein of coal, together with a right to mine it, and to construct shafts, tunnels, roads, drains and ditches across and upon the land wherein the coal lies, and to use said land for mining coal from adjoining land, the grantee has the right to keep open the tunnels connecting the mines under said land with those under the adjoining land, and to drain the latter mines through such tunnels.[2] And a lessee is not bound to maintain barriers so as to prevent air and water from flowing through the lessor's mine, nor is he liable to pay for way-leave or air-leave.[3]

§ 1297. To deliver up in good order.—This is a companion covenant with the one for good mining, and any act which violates the one is a breach of the other. It requires the mine or quarry to be kept in a reasonably good, workmanlike condition, and to be so surrendered up at the expiration of the lease.[4] But it does not prevent the removal of fixtures and appliances properly removable.[5] The custom

[1] Cons. Coal Co. v. Schaeffer, 135 Ill. 210, 25 N. E. Rep. 788. See also Crompton v. Lea, L. R. 19 Eq. 115; Thomas Iron Co. v. Allentown M. Co., 23 N. J. Eq. 77.

[2] Genet v. Delaware & Hudson Canal Co., 122 N. Y. 527, 25 N. E. Rep. 992.

[3] Jegon v. Vivian, L. R. 6 Ch. App. 742, 8 M. R. 628.

[4] Jegon v. Vivian, L. R. 6 Ch. App. 742; Martin v. Porter, 5 M. & W. 351; Griffin v. Fellows, 81 Pa. St. 114; Walker v. Tucker, 70 Ill. 527; Keeler v. Green, 21 N. J. Eq. 27; Timlin v. Brown, 158 Pa. St. 606; Trout v. McDonald, 83 Pa. St. 144; Coppinger v. Armstrong, 8 Ill. App. 210; s. c., 5 Ill. App. 637. See also Moyers v. Tiley, 32 Pa. St. 267.

[5] Timlin v. Brown, *supra;* Rolleston v. New, 4 Kay & J. 640.

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to remove pillars, however, is not available against an express contract not to do so.[1]

§ 1298. "Instroke," definition—When proper mining. "Instroke" is a term applied in the north of England where a mining operator works adjoining lands through the lands of a particular demise.[2] In some cases this sort of mining is held to violate the covenant for good mining; but, in the absence of actual wrong, such mining is not improper *per se*, and does not necessarily violate such covenant. Formerly it was generally thought that the right to pass through worked mines into adjoining premises did not exist unless specially covenanted for. But the better considered cases now seem to hold that this mode of mining is entirely competent and proper where there is no covenant to the contrary.[3]

§ 1299. "Instroke," an exceptional case controlled by the contract.— Where the owners of coal lands entered into a contract with a company by which they sold all coal, coal oil and other minerals in their lands to the company, and were to convey ten acres of land to it, on which the company agreed to sink a shaft two hundred and thirty feet deep to mine the coal; the owners agreeing that if coal was not found within that time they would refund the money to the company upon a reconveyance to them, and would pay all expenses of sinking such shaft; but if coal should be found the company should pay them ten cents per ton royalty on all coal raised; and coal was found within the depth specified, of sufficient value to justify mining, and, after operating the mine for some time and paying the agreed royalty thereon, the company conveyed its right to a third party, who bought

[1] Randolph v. Halden, 44 Iowa, 327. See also Griffin v. Fellows, 81 Pa. St. 114.

[2] Bainb. Mines, p. 68.

[3] Jegon v. Vivian, L. R. 6 Ch. App. 742; Wheatley v. Westminster Brymbo Coal Co., L. R. 9 Eq. 538; Whalley v. Ramage, 10 W. R. 315; Lewis v. Fathergill, L. R. 5 Ch. App. 103; Tiley v. Moyers, 25 Pa. St. 397; Madison v. Garfield Coal Co. (Iowa), 86 N. W. Rep. 41.

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lands near the shaft, and proceeded to cut through to reach his own land, intending after that to abandon work in the lands where the shaft was sunk,— the court restrained such operations upon the ground that it was the evident intention of the parties that mining through that shaft should be confined to the lands embraced in the contract.[1]

Where parties enter into an agreement for procuring coal from certain premises, all the means necessary are presumed to be within the contemplation of the parties at the time; and where the coal or ore is so situated as that it is fairly within the understanding of the parties that it should be taken out through or over particular land, it will be presumed that the parties had this mode in contemplation. Thus, where the parties entered into an agreement whereby the right was given, *inter alia*, "of taking the coal from other lands through the entries and railways made and used in taking out the coal above granted," the court held that this implied the right to remove the coal over any part of the land taken, using these words: "It is the duty of the court to give such a construction to this grant as shall give it effect. To do this, we must hold that the right to bring the coal from other land to the entries and railways under the McClure (land) is necessarily incident to the right to transport it over them, and that in opening a way from the side entry to the surface, . . . the appellants were not trespassers, but were in the exercise of a clear legal right under the terms of the grant."[2]

§ 1300. As to payment of taxes.—It is customary in some districts to provide for the payment of taxes. In the absence of such provision, of course, the taxes would be payable as the interest appeared, by the lessor as the owner of the soil, and by the lessee for all improvements; and if the product was taxed under the laws of the state, the lessee,

[1] Levers v. Cleary, 75 Ill. 349.

[2] Gumbert v. McCracken, cited also as McCracken v. Gumbert, 131 Pa. St. 36, 18 Atl. Rep. 1068. See also Dunham v. Haggerty, 110 Pa. St. 560, 1 Atl. Rep. 667.

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of course, would be obliged to pay that tax in every case where his royalty or rent is a money consideration. Thus, where the owners of coal lands leased them for the mining of the coal, reserving the surface, and the lease provided that the lessor should pay all the taxes on the land leased, and the lessees should pay all taxes on their buildings and improvements, and upon the coal after it was mined, it was held that, though the lease divided the ownership of the surface and of the coal before it was mined, the lessor was liable for taxes on both.[1] This, of course, means the taxes on the coal *in situ* as a valuation, and not upon the mined product which is the property of the lessee. But under a lease of a coal mine providing that the lessee shall pay all and every United States, state and local tax, duty and impost on the coal mined, the mining improvements of every kind, and the surface and coal land itself, the lessee is not required to pay a municipal tax for the construction of a sewer or for paving a street.[2]

§ 1301. Lessee's right to quiet enjoyment.— The covenant for quiet enjoyment generally involves the right to an extension of the lease for any time when the lessee shall be prevented from operating the mine by reason of any unforeseen circumstance, or the injunction of a court.[3] Otherwise than this, it is the general right flowing from their relation of landlord and tenant, which is implied even though not expressed in the lease.[4] The regular covenant for quiet enjoyment which the law implies and writes into the oil lease is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or with-

[1] Miles v. Delaware & Hudson Canal Co., 140 Pa. St. 623, 21 Atl. Rep. 427.

[2] Pettebone v. Smith, 150 Pa. St. 118, 24 Atl. Rep. 693. But see *ante*, § 1289.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 202, 208; Turner v. Reynolds, 23 Pa. St. 199; Burr v. Spencer, 26 Conn. 159; Swan v. Brown, 8 Kan. App. 505, 56 Pac. Rep. 141; Knotts v. McGregor, 47 W. Va. 566, 35 S. E. Rep. 899.

[4] Tiley v. Moyers, 43 Pa. St. 404; Walker v. Tucker, 70 Ill. 527, 8 M. R. 333; Knotts v. McGregor, *supra*.

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holding from the lessee the possession for such purposes.[1] But the covenant for quiet enjoyment is not broken by the mere fact alone that the lessor makes another lease of the premises during the term, whether the lessee be in actual possession or not.[2]

§ 1302. Summary.— The deductions from the foregoing are, that the parties should, and generally do, protect their rights carefully by the contract, and that the intent as manifested by the contract, and ascertained in the usual way, is controlling in all cases, the same as in all other contracts. Provisos are limitations, as a general rule, but may be construed as covenants, depending upon the context, the general circumstances and the manifest intention of the parties. The covenant to test and work is an important one, and what is sufficient to satisfy it should be provided in the contract; but in the absence of that, a fair, honest effort to determine the presence of mineral of merchantable character is the least that will satisfy the law. The lease implies, in the absence of any other provision, that the lessee is entitled to quiet enjoyment, and this is but the statement of a fundamental rule, another of which is that he cannot dispute the lessor's title. The covenants on the part of the lessor are for the protection of the lessee, and he is entitled to a fair and honest observance of the same according to their letter and spirit.

Covenants for timbering and the leaving of proper supports and pillars, likewise covenants against flooding, should usually be provided for; but where not provided for, they are usually comprehended by and included in the covenant for good mining. And this covenant will be implied to a very great extent, even if not expressed, for the reason, among others, that the law enjoins as a duty upon the lessee that he carry on the mining operations in such a way as not to materially injure the mine.

[1] Knotts v. McGregor, 47 W. Va. 566, 35 S. E. Rep. 899. [2] Id.

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Mining by the instroke, where the lessee is in possession of both pieces of land, and where it is fairly within the intention of the parties, is now considered as permissible, or at least not seriously objectionable.

Of course, contracts are always made with the expectation that they will be kept and performed, but not differently here than elsewhere in the law; for which reason, and because equity will not be made an engine of oppression, unreasonable or impossible provisions will, as a rule, be relieved against in equity.

There are certain cases where the contract provides for the performance of certain things on the part of the lessee, such as the payment of taxes or the like, the omission to do which might work a serious injury to the estate. In all such cases it is the right and privilege of the lessor to discharge such obligations, and they thereby become a lawful charge against the lessee.

Article F.

Right of Lessee to Machinery and Fixtures.

§ 1311. Mining machinery and fixtures in general — What removable by lessee.
1312. Same subject — Intent — Adaptability — Good repair.
1313. The early common-law rule and customs.
1314. Early customs to the contrary — Fixtures remain personal property.
1315. Intention and circumstances, and not always the mode of annexation, the test.
1316. The rule in case of a forfeited lease.
1317. Custom affecting removal.
1318. What included in the right to remove.
1319. Coal severed — Right of removal.
1320. Summary.

§ 1311. Mining machinery and fixtures in general — What removable by lessee.— Obviously, the safer course is to provide for the ownership and removal or purchase, by the lessor, of mining machinery, fixtures and appurtenances

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placed upon the leased mine by the lessee. Where, however, the parties have omitted this, the general rule, coming down to us from ancient customs in England, is that such machinery, appurtenances, fixtures and appliances as are placed there by the lessee and can be removed without serious injury to the mine are his personal property, and are removable by him at the expiration of the lease, or within a reasonable time thereafter, unless there is a clear intention to the contrary.[1] An example of this rule is thus stated in an article in a leading law review: "Where land is leased for mining purposes, engines and machinery placed on the land, as well as houses for miners to live in temporarily, and any other structures necessary to the carrying on of the

[1] Foley v. Aldenbrooke, 13 M. & W. 174; Lawton v. Lawton, 3 Atk. 13; Penton v. Robart, 2 East, 91; Elwes v. Maw, 3 East, 54; Pugh v. Arton, L. R. 8 Eq. 626; Grymes v. Boweren, 6 Bing. 439; Van Ness v. Packard, 2 Pet. 137; Brown v. Reno Electric L. & P. Co., 55 Fed. Rep. 229; New Chester Water Co. v. Holly Mfg. Co., 53 Fed. Rep. 19; Merritt v. Judd, 14 Cal. 59; Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. Rep. 880; Hayes v. New York G. M. Co., 2 Colo. 273; Dobschuetz v. Holliday, 82 Ill. 371; Hewit v. General Electric Co., 61 Ill. App. 168; Alexander v. Touby, 13 Kan. 64; Cooper v. Johnson, 143 Mass. 108, 9 N. E. Rep. 33; Nelson v. Howison, 122 Ala. 573, 25 S. Rep. 211; Conrad v. Saginaw M. Co., 54 Mich. 229, 20 N. W. Rep. 39; Lake Superior S. Canal, R. & I. Co. v. McCann, 86 Mich. 106, 48 N. W. Rep. 692; Wheeler v. Bedell, 40 Mich. 693; Bewick v. Fletcher, 41 Mich. 625; Ingersoll v. Barnes, 47 Mich. 104, 10 N. W. Rep. 147; Thomas v. Davis, 76 Mo. 73; Richardson v. Knocks, 81 Mo. 264; Springfield Foundry & M. Co. v. Cole, 130 Mo. 1, 31 S. W. Rep. 922; Wolford v. Baxter, 38 Minn. 12, 21 N. W. Rep. 744; Stout v. Stoppel, 30 Minn. 56; Prescot v. Wells, Fargo & Co., 3 Nev. 82; Audenried v. Woodward, 28 N. J. L. 265; Mutual Life Ins. Co. v. Dowden (N. J. Eq.), 3 Atl. Rep. 351; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. Rep. 811; Massachusetts Nat. Bank v. Shinn, 18 App. Div. 276, 46 N. Y. S. 329; Watts-Campbell Co. v. Yuenling, 125 N. Y. 1, 25 N. E. Rep. 1060, affirming s. c., 3 N. Y. S. 869; Hill v. Sewald, 3 P. F. Smith, 271; Hay v. Brown, 61 Pa. St. 87, 90; Overton v. Williston, 31 Pa. St. 155; Davis v. Moss, 38 Pa. St. 346; Gray v. Holdship, 17 S. & R. 513; Mitchie v. McAllister, 14 C. C. R. (Pa.) 267; Hetner v. Lewis, 73 Pa. St. 302; Seeger v. Pettit, 77 Pa. St. 437; Church v. Griffith, 9 Pa. St. 117; White's Appeal, 10 Pa. St. 52; Montooth v. Gamble, 123 Pa. St. 240; Castle v. Crowthers, 193 Pa. St. 359; Sheller v. Shivers, 171 Pa. St. 269.

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business for which the land is leased, and intended for no other purpose, are trade or business fixtures and may be removed by the lessee at or before the expiration of the lease."[1]

§ 1312. Same subject — Intent — Adaptability — Good repair.— Not different from the general rule of contracts, the intent of the parties must be sought after, and when ascertained becomes the controlling factor in the determination of the ownership of machinery or fixtures placed upon a mining claim by a lessee or one operating a working bond. A clear statement of the controlling principles as a rule was made by the supreme court of Michigan in an early case, the principle of which has been followed by many of the later cases.[2] This was to the effect that, if possible, the rights of the parties must be measured by the contract existing between them. But where the lease is silent as to the disposition to be made of the annexations upon its expiration, the circumstances surrounding the execution, aided by parol testimony, will be looked to for the purpose of ascertaining the intent of the parties. Following this principle, the court decided from the testimony in the case, that the machinery was placed upon the premises by the lessee for the purpose of assisting him in his mining operations, and not with any intention to make it accessory to the soil; and that, as it could be removed without materially disturbing the land, the lessee would be permitted to do so. This is in harmony with what we have elsewhere[3] endeavored to announce as the true rule to be followed in such cases.

[1] 46 Cent. Law Jour. 283. See also Brinkmeyer v. Rankin (Ky.), 61 S. W. Rep. 1007.

[2] Conrad v. Saginaw M. Co., 54 Mich. 289, 20 N. W. Rep. 89. See also Manwaring v. Jennison, 61 Mich. 117, 27 N. W. Rep. 899; Lake Superior, etc. I. Co. v. McCann, 86 Mich. 106, 48 N. W. Rep. 692; Booth v. Oliver, 67 Mich. 664, 35 N. W. Rep. 793; Castle v. Crowthers, 193 Pa. St. 359, 44 Atl. Rep. 446; Wick v. Bredin, 189 Pa. St. 83, 42 Atl. Rep. 17; Hill v. Sewald, 53 Pa. St. 271; Voorhis v. Freeman, 2 Watts & S. 116; Seeger v. Pettit, 77 Pa. St. 437; Mickle v. Douglas, 75 Iowa, 78, 39 N. W. Rep. 198.

[3] *Ante*, § 1202.

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§ 1313. The early common-law rule and customs.— The early common-law rule seems to have been to the contrary, and there could have been no severance at all after the annexation of such fixtures, and appliances that came within the general definition of fixtures. But the liberality of modern times has introduced the modification which has become the general rule as outlined in the preceding sections. The first instance that we have been able to ascertain, in which the old rule was departed from, was by Comyns, C. B.[1] But it was afterwards recognized by both Lords Hardwicke and Ellenborough,[2] and followed in a still later case.[3] So that it may now be safely said that the same rule obtains in England as in this country, and that unless there is some circumstance connected with their annexation, or some provision in the contract showing a contrary intention, all machinery and fixtures placed there by the lessee are his property.

§ 1314. Early customs to the contrary — Fixtures remain personal property.— The early customs in the mining regions of England seemed to base the rights of the parties upon similar principles as obtain to-day; and while they required the removal during the leasehold period, or within a reasonable time after, there seems to have been no question as to the ultimate right. Lord Chancellor Selborne shows how, by the early customs obtaining in England, mining machinery and fixtures were held to be an exception from the application of the maxim, "*quicquid plantatur solo, solo cedit.*" This decision was based chiefly upon the grounds that all such annexations are placed upon the property by the miner for his sole benefit, and paid for with his own money; that he has a perfect right to place upon the property whatever he chooses for the purpose of facilitating operations; that the property is not injured thereby, nor is

[1] Lawton v. Lawton, 3 Atk. 15.
[2] Mather v. Fraser, 3 L. J. Ch. 361.
[3] Dudley v. Ward, Amb. 113. See also Penton v. Robart, 2 East, 91; Elwes v. Mawe, 3 East, 54; Lawton v. Salmon, 1 H. Bl. 260.

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its original value diminished by their removal. The lessee was accordingly held to have a perfect right, in the absence of custom to the contrary, to remove the fixtures, provided he did so within a reasonable time, and that he was not a trespasser in so doing. And this must be the true rule.[1] Applying the same rule in this country in a case in Pennsylvania, where the lease authorized the removal of the mules, mine or coal cars, powder, mine rails and tools, but forbade the removal of other repairs and improvements, it was held that steam appliances and cars put in for the purpose of hauling, in the place of the mules, might be removed.[2]

§ 1315. Intention and circumstances, and not always the mode of annexation, the test.— It will thus be seen that, as applied to mining leases, there has been a very great relaxation of the rule by which fixtures, houses and the like annexed to real property are said to become a part of the soil.[3] As was said by the supreme court of Oregon in a late case: "The character as a chattel may be maintained as personalty, although annexed to the realty, and though it has adaptation to the use to which the realty is subjected, by the convention of the parties affected, or by the intention or purpose of the party making the annexation. In the case at bar there were annexation and adaptability, so that the question of intention only remains, and that is a mixed question of fact and law. The fact comprises the intention, and when this is ascertained the law fixes the status."[4]

[1] Wake v. Hall, L. R. 7 Q. B. 295, 6 M. R. 119; Elwes v. Mawe, 3 East, 98; Whitehead v. Bennett, 27 L. J. (N. S.) Ch. 474.

[2] Beach Creek C. & C. Co. v. Mitchell, 193 Pa. St. 112, 44 Atl. Rep. 245. See also Brinkmeyer v. Rankin (Ky.), 61 S. W. Rep. 1007.

[3] Alberson v. Elk Creek G. M. Co. (Oreg.), 65 Pac. Rep. 978, citing Henkle v. Dillon, 15 Oreg. 610, 17 Pac. Rep. 148; Landegan v. Mayer, 32 Oreg. 245, 51 Pac. Rep. 649; Tillman v. Delacey, 80 Ala. 103; Binkley v. Faulkner, 117 Ind. 176, 19 N. E. Rep. 753, 3 L. R. A. 83.

[4] Alberson v. Elk Creek G. M. Co., *supra;* Allen v. Mooney, 130 Mass.

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It seems, moreover, that it is not absolutely essential to the right that a privilege of removal be reserved in the lease; but to the contrary, and as a general rule, the law will often, and indeed most generally, imply the right of removal of those fixtures and appliances placed there peculiarly for the use and benefit of the lessee while operating the mine. Quoting again from the supreme court of Oregon: "There was no express agreement or stipulation between the parties that the Daveys might remove such improvements, but we are of the opinion that under the conditions prevailing the law implied one."[1]

§ 1316. The rule in case of a forfeited lease.— It has been held, under very peculiar circumstances, and which can hardly be said to announce a fixed and definite rule, that when a lease is forfeited the fixtures go to the landlord.[2] But the sounder and prevailing authority seems to be to the contrary.[3] The supreme court of Pennsylvania, quoting from a late work on mining law, holds that under a lease making forfeiture the penalty for non-payment of royalty, and providing that all buildings placed upon the land by the lessee might be removed at the termination of the lease, "unless all right thereto has been forfeited by a forfeiture of the lease," the lessee has the right to remove buildings within a reasonable time, despite the fact that the lease has been forfeited for non-payment of royalty.[4] But in one case a covenant to deliver the machinery at the ex-

155; Philadelphia Mtg. & Trust Co. v. Miller (Wash.), 56 Pac. Rep. 382; Tillman v. Delacey, 80 Ala. 103; second appeal, 83 Ala. 155, 3 S. Rep. 294.

[1] Alberson v. Elk Creek G. M. Co. (Oreg.), 65 Pac. Rep. 978. See also Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 56 N. W. Rep. 821; Moore v. Valentine, 77 N. C. 188.

[2] Davis v. Moss, 38 Pa. St. 346. See also Mass. Nat. Bank v. Shinn, 46 N. Y. S. 329; affirmed, 57 N. E. Rep. 611.

[3] Sumner v. Bronilow, 34 L. J. Q. B. 130.

[4] Cassell v. Crowthers, 193 Pa. St. 359, 44 Atl. Rep. 446, citing (*q. v.*) Barr. & Ad. Mines, p. 151; Mickle v. Douglass, 75 Iowa, 78, 39 N. W. Rep. 198; 12 Am. & Eng. Enc. Law (1st ed.), 758, note 7; Wick v. Bredin, 189 Pa. St. 83, 42 Atl. Rep. 17. But compare Potter v. Gilbert, 177 Pa. St. 159, 35 Atl. Rep. 597 (a case of insolvency where the improvements were forfeited to the lessor).

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piration of the lease was not enforced in the face of a prevailing custom to the contrary.[1] And in a Colorado case where there was a covenant not to remove, it was held that the lessee had no attachable interest which could be acquired by an attaching creditor.[2]

§ 1317. Custom affecting removal.— Wherever there is a custom of the vicinage, either falling within the definition of the common-law custom or of the miners' rules, affecting the question of removal of fixtures or machinery, in the absence of a showing to the contrary to the extent that it affects the question, it would be controlling.[3]

§ 1318. What included in the right to remove.— Even conceding the right of removal of certain fixtures and appliances, it often becomes matter of dispute, as we have seen, as to what is included in the right. It is difficult to lay down any general hard-and-fast rule. It would seem, however, that those appliances, improvements and fixtures placed there especially for the use of the lessee and for the purpose of the mining operations, and which can be removed without serious permanent injury to the mine, are comprehended in the right. Of course, one cannot remove the timbers and props placed in the mine to prevent caving, nor any other equally indispensable improvement or appliance; 'but since, as we have seen, a steam-hauling appliance taking the place of the mules fell fairly within the terms of the lease which permitted the mules to be removed,[4] it would not be an extravagant rule which permitted the removal of the tramway[5] or other movable goods used for mining purposes.[6] And it has even been held in Ohio that, where oil

[1] Talbot v. Ford, 13 Sim. 173.

[2] Little Valeria G. M. Co. v. Lambert (Colo. App.), 62 Pac. Rep. 966.

[3] Wake v. Hall, L. R. 7 Q. B. Div. 295; Arkwright v. Cantrell, 7 Ad. & El. 565; Crawford v. Oman & Stewart Stone Co., 84 S. C. 90, 12 S. E. Rep. 929. See also note 4, § 1316, p. 1042.

[4] *Ante*, § 1314, note 2, p. 1041.

[5] Duke of Beaufort v. Bates, 8 De Gex, F. & J. 381.

[6] Fisher v. Dixon, 12 Cl. & Fin.

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and gas were not found in paying quantities, the lessee had the right to draw and remove the tubing, casing and drive-pipe at any time prior to the expiration of the lease.[1] And it has been held that the machinery and appliances may be sold on an execution against the lessee.[2]

§ 1319. Coal severed — Right of removal.— Since coal and other mineral broken and severed thereby become personal property, it would seem to follow that the lessee has the right to remove the same under the same conditions that he may remove other personal property belonging to him, either during the lease or within a reasonable time after.[3] And it has been held that he may use a tramway laid upon the land and used in connection with the mining operations for the purpose of such removal.[4]

§ 1320. Summary.— It appears from the foregoing sections and the law we have attempted to outline therein, that, in the absence of an express stipulation in the lease expressly reserving all machinery, appliances and fixtures to the lessor, all such that were placed on the mining property for the use of the lessee and to facilitate the extraction of the minerals, except timbering, props and the like, which cannot be removed without threatening the destruction of the property, remain the personal property of the lessee and may be removed by him at any time during the leasehold term, or within a reasonable time thereafter, and when he can do so without committing a trespass.

That the manner of annexation is not important, and adaptability to the particular use only furnishes a guide toward the intention of the parties, which after all is the

312; Bainb. Mines (1st Am. from 3d Lond. ed.), p. 164.

[1] Siler v. Globe Window Glass Co., 21 Ohio C. C. Rep. 284.

[2] Heffner v. Lewis, 73 Pa. St. 302. See Hays v. New York G. M. Co., 2 Colo. 273.

[3] Lykens Valley Coal Co. v. Dock, 62 Pa. St. 232; In re Huddell, 16 Fed. Rep. 373; Riley v. Boston Co., 11 Cush. (Mass.) 11; Crouch v. Smith, 1 Md. Ch. 401.

[4] Lykens Valley Coal Co. v. Dock, *supra*.

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true test, and must determine whether the appliances and fixtures may be removed or not. But this intention must be shown by the surrounding circumstances, the customs of the vicinage, and the letter and spirit of the lease as they have made it.

And even a forfeited lease does not in general authorize a forfeiture of the machinery and fixtures placed upon the leased property.

All personal property of every kind, including severed coal and mineral, may be likewise removed in the same manner.

Article G.

Of Miscellaneous Rights and Duties. Including Conflicting Leases and Exclusive Rights; Likewise Property in Other Product.

§ 1326. When tenants' rights and possession exclusive.
1327. Limitations on the right dependent upon nature of instrument.
1328. Different rule where right reserved.
1329. When lessee is entitled to entire product.
1330. Restatement — Additional royalty.
1331. Opening new mines.
1332. Conflicting surface and sub-surface leases.
1333. Summary — The matter in this article restated.

§ 1326. When tenants' rights and possession exclusive. There have been many cases wherein the exclusiveness of the mining right has been called in question, many of the older cases holding that a tenant's right, even under an instrument that they called a lease, was not exclusive,[1] but that the lessor might demise the same premises to other lessees. The later authorities, however, generally announce a different rule, as do also some of the older and better considered cases. And it may now be laid down as settled law that the chief distinction between a lease and a license, in general, is that the former is exclusive while the latter is

[1] Harlow v. Lake Superior Iron Co., 36 Mich. 105, citing Cheatham v. Williamson, 4 East, 469, 476; Stockbridge Co. v. Hudson Co., 107 Mass. 322; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173.

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not. Thus, in an early case in the federal court, where land was leased for the sole and only purpose of mining and excavating for petroleum, coal, and other minerals, it was held that it conferred an exclusive right on the lessee.[1] In a leading case in South Carolina, where all the principal cases were collected and reviewed, the law was laid down by the court, in substance, to the effect that the intent to exclude the grantor, whether from all mineral substances, or all of one or more classes, may be expressed in three modes: First, by terms importing a sale and conveyance of minerals, as such, in which case the grantor's right is excluded by a necessary implication from the possession of full proprietary rights on the part of the grantee; second, by words of conveyance conferring on the grantee exclusive power over the subject-matter of the grant; and third, by provisions excluding the grantor from the performance of acts appropriate to him as owner of the land, where the effect of such exclusion is to leave unlimited control in the grantee of all materials to which the mining right relates. A portion of the court's language was as follows: "An intent to exclude the grantor, though not expressed in the body of the deed, may be implied from the nature of the consideration. The fact that the grantee is bound to pay for the substances appropriated by him according to the quantity realized, at an agreed rate, whether in kind or in money, does not, of itself, disclose an intent to exclude the grantor. But if the consideration appears to include a value fixed by the parties on the whole mineral deposit, and is demandable absolutely under the contract, without depend-

[1] Barker v. Dale, 2 Fed. Cas. 810, 8 M. R. 597. See also East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Canfield v. Ford, 28 Barb. 336; Massott v. Moses, 3 S. C. 168, 16 Am. Rep. 697, 8 M. R. 607; Wigman v. Norton, 24 Colo. 192, 49 Pac. Rep. 283; Scioto Fire Brick Co. v. Pond, 38 Ohio St. 65; Maxwell v. Todd, 112 N. C. 677, 16 S. E. Rep. 926; Marvin v. Brewster Iron Co., 55 N. Y. 538; Inhabitants of Worcester v. Green, 2 Pick. 425; Chester Emery Co. v. Lucas, 112 Mass. 124; Adams v. Ore Knob Copper Co., 7 Fed. Rep. 634; Huggins v. Daley, 99 Fed. Rep. 606.

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ing on the value of the actual result, from the mining operations of the grantee, the grant is regarded as a sale of the mineral, and as to it the grantor is excluded."[1]

§ 1327. Limitations on the right dependent upon nature of instrument.— The general trend of judicial opinion, wherever the lease or other instrument is, on its face, a conveyance of an interest in the land for the time being, is to the effect that he may maintain ejectment, even against the lessor, unless the lessor's entry is within the terms of the lease or other instrument itself. But in some of the older cases, where the lessee's rights were not fully determined and defined, and it was more in the nature of a license, this right was held not to exist. Thus, as was said by Judge Dillon: "When a grant of mines is so worded as not to operate as an actual demise, but only a license to dig, search for and take metals and mineral within a certain district, it seems that a party claiming under such a grant, and who shall open and work and be in actual possession of any mines, may, if ousted, maintain ejectment with respect to them; but he cannot maintain ejectment, either in respect of mines within the district (*i. e.*, lying within the bounds of his privilege) which he has not opened, or which, having opened, he has abandoned."[2] And the court held that the case must turn on the question as to whether the plaintiff had actually abandoned the *locus* in dispute or not; and that it had been lost to another tenant.

§ 1328. Different rule where right reserved.— Where a lease of mining land expressly reserves to the lessor the use and possession of the land for every other purpose except mining, the lessor's right to cut timber is expressly

[1] Massott v. Moses, 3 S. C. 168, 8 M. R. 607. See also Doe v. Wood, 2 B. & Ald. 724; Muskett v. Hill, 2 Bing. N. C. 654; Caldwell v. Fulton, 31 Pa. St. 475; Funk v. Haldeman, 53 id. 229; Clement v. Youngman, 40 id. 341.

[2] Beatty v. Gregory, 17 Iowa, 109, citing and quoting from Adams on Ejectment, p. 20; also citing Bainb. Mines, 494; Collier, Mines 18.

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limited to such use as might be necessary for mining purposes. And while the lessee is not liable for royalty unless he finds ore, he has not the right to remove timber nor disturb the surface other than for mining purposes.[1]

§ 1329. When lessee is entitled to entire product.— In a Pennsylvania case the lessee held possession under a lease authorizing the digging of pits and salt wells for the production of salt. In operating for this purpose, petroleum began to flow with the brine, and the lessor brought trover against the lessee for its conversion. The supreme court of Pennsylvania, speaking through Reed, J., held, very emphatically, that the rights of the parties were precisely the same as if the spring had been opened, and one or both liquids flowing from it, before the execution of the lease.[2] But, of course, as we have seen,[3] a contract might be so worded as to prohibit the lessee from taking more than one kind of product.

Where a landlord leased premises for the sole purpose of mining and taking carbon oil therefrom at a fixed royalty, and the tenant opened a well which produced both oil and hydro-carbon gas, the latter issuing in large quantities from the well, the tenant separating the gas from the oil and piping it beyond the premises, where he appropriated it to his own use, not accounting to the landlord therefor, it was held that he was not liable to the landlord.[4] But it has been held that where a lease authorized the lessee to take out iron ore from certain land, to wash the same on the premises, and do everything necessary to get out the ore, no right is given to him to take the refuse matter from the premises for the

[1] Gribben v. Atkinson, 64 Mich. 651. See Darcy v. Asquith, Hutton, 19; Rogers v. Price, 8 C. B. 894, 19 L. J. C. P. 121. See also Walker v. Tucker, 70 Ill. 527.

[2] Kier v. Peterson, 41 Pa. St. 357. Supporting the same principle, see Lance v. Lehigh & W. Coal Co. (Pa. St.), 29 Atl. Rep. 755; Carr v. Benson, L. R. 3 Ch. 524.

[3] *Ante*, § 1217.

[4] Wood County Petroleum Co. v. West Virginia Trans. Co., 28 W. Va. 210, 57 Am. Rep. 659; Ormsby Coal Co. v. Bestwick, 129 Pa. St. 572, 18 Atl. Rep. 538.

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purpose of manufacturing paint.[1] So, the granting of a right to quarry granite and market the dimension stone thereof, on which a royalty is paid, it is said, does not give a right to take the rubble without payment.[2]

§ 1330. Restatement — Additional royalty.— It would seem clear that the lessee has the right to market the particular product agreed for in the lease, no matter in how many different forms it may be segregated, by cleaning, washing and milling. Of course the rule might be different where another vein is encountered than the one bargained for, and not known to exist. But as to the particular vein, this certainly has the weight of reason, the lessee being only responsible to the lessor, as he should be, for any additional royalty for the by-product fairly falling within the contract.[3]

§ 1331. Opening new mines.— The old rule was that the tenant could not open new mines; but, strictly, there is no unopened mine.[4] What is meant by the doctrine, as now understood, is that the lessee has not the right to mine beyond the vein, or outside the boundaries specified in his lease, even though the same may belong to his landlord.[5]

§ 1332. Conflicting surface and sub-surface leases.— As a general rule there should be no conflicts between surface and sub-surface leases. Where they occur they are ordinarily referable to the doctrine of severance.[6] So, too,

[1] Appeal of Erwin (Pa.), 12 Atl. Rep. 149: Westmoreland v. New Sharlston Colliery Co., 80 L. T. (N. S.) 846.

[2] Emery v. Owings, 6 Gill (Md.), 191.

[3] Supporting this principle, see Watson Coal & M. Co. v. Casteel, 78 Ind. 296; Williams v. Summers, 45 Ind. 532; Austin v. Huntsville Coal & M. Co., 72 Mo. 535; Freck v. Locus Mountain C. & I. Co., 86 Pa. St. 318; Emery v. Owings, 6 Gill, 191; Genet v. Delaware & Hudson Canal Co., 163 N. Y. 173, 57 N. E. Rep. 287.

[4] Astray v. Ballard, 2 Mod. 193; Shaw v. Wallace, 25 N. J. L. 453; Crouch v. Puryear, 1 Rand. (Va.) 258.

[5] Griffin v. Fellows, 81 Pa. St. 141; Owings v. Emery, 6 Gill, 260; Walker v. Tucker, 70 Ill. 527; Gowan v. Christie, 2 Sc. App. 273; Raisbeck v. Anthony, 75 Wis. 300, 43 N. W. Rep. 900. See also In re Maynard's Settled Estate, 68 L. J. Ch. 609.

[6] Owings v. Emery, 6 Gill, 260;

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the question as to whether a tenant may open a new mine, in the absence of express authority in the lease, is referable to the right of a life tenant, with this exception: that where a certain vein of exact boundaries is demised, and no express prohibition, the tenant has the right to get the product by any lawful means.

§ 1333. Summary — The matter in this article restated.— Briefly to restate the law gleaned from the foregoing matter, we may lay down the following principles:

First. The particular difference and most controlling one between leases and licenses is that, as a general rule, a lease is exclusive within the limits and boundaries of the thing demised; while a license is not exclusive, and successive licenses may be made, as we shall see later on, of and concerning the same territory.

Second. From the statement in the previous subdivision and the law as it now stands, the proposition is deducible that the lessee, so long as he is squarely within the terms of his lease, may exclude all the world, even the lessor.

Third. His possession being exclusive, he may maintain all needful possessory actions.

Fourth. Where the grant is of the entire contents within a given area, or where gas or other useful products are obtained from an oil well, the lessee is entitled to the entire product, even though not specified in his lease; but, of course, he must pay royalty thereon.

Article H.

Of Assignments of Leases in General.

§ 1340. When assignments may be made.
1341. When not assignable — Personal skill — Change in partnership.
1342. Assignment of lessor — Effect.

Walker v. Tucker, 70 Ill. 527; Moore v. Miller, 8 Pa. St. 272; Racine v. Anderson, 4 Bing. N. C. 702. See Harlow v. Lake Superior Iron Co., 36 Mich. 105.

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§ 1343. Lessee liable notwithstanding assignment of lease.
1344. Lessee and his assignee equally liable.
1345. Limitations — Intermediate assignee.
1346. Covenants running with the land — Actual entry not necessary.
1347. Summary — The doctrine of this sub-title restated.

§ 1340. When assignments may be made.— The general policy of the law, as well as the dictates of sound business interests, are in favor of the doctrine that, in the absence of express covenants to the contrary, all leases are assignable; especially where, by their terms, they run to the heirs and assigns of the lessee. Nor will covenants against assignment be construed to work a forfeiture on account of an assignment of the lease, unless this is shown to be the clear intention of the parties, and forfeiture is made the penalty. The common practice is to make leases assignable. So it is that an assignment of a lease may generally be made where it is not forbidden, or where by an entire consideration of the lease it is tacitly authorized. In mining leases, differently from all others, the working of the land and securing of the product is the principal object of the contract, and the *personnel* of the tenant is a secondary consideration; and so, the reason failing, the rigid rule against assignment generally becomes somewhat relaxed.[1]

[1] Bates v. Donaldson (1896), 2 Q. B. 242; In re Huddell, 16 Fed. Rep. 373; Malcomson v. Wappoo Mills, 85 Fed. Rep. 907; Cons. Coal Co. v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Caley v. Portland, 12 Colo. App. 397, 56 Pac. Rep. 350; Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. Rep. 66; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196; Boydston v. Meacham, 28 Mo. App. 494; Waters v. Stevenson, 13 Nev. 157; Trotter v. Heckscher, 42 N. J. Eq. 254; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. Rep. 1093; Bradford Oil Co. v. Blair, 113 Pa. St. 83, 57 Am. Rep. 442, 4 Atl. Rep. 218; Fisher v. Miliken, 8 Pa. St. 111; Goddard's Appeal, 1 Walker, 97; Pittsburg Cons. Coal Co. v. Greenlee, 164 Pa. St. 549, 30 Atl. Rep. 489; Lykens Valley Coal Co. v. Dock, 62 Pa. St. 32; Watt v. Dininy, 141 Pa. St. 22; Washington Nat. Gas Co. v. Johnson, 123 Pa. St. 576; Aderhold v. Oil Well Supply Co., 158 Pa. St. 401; Smith v. Munhall, 139 Pa. St. 253; Guffey v. Clever, 146 Pa. St. 548; Williams v. Short, 155 Pa. St. 480; Comegys v. Russell, 175 Pa. St. 166, 34 Atl. Rep. 657; Fennell v. Guffey, 139 Pa. St. 241; McGuire

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§ 1341. When not assignable — Personal skill — Change in partnership.— In Virginia, under a contract conferring upon skilled miners the privilege to raise ore, with certain incidental rights, continuing as long as they should deem it worthy of searching for minerals, and in which they agreed not to use the land for any other purpose, it was held that the contract constituted a non-assignable lease, the personal skill of the miners being contracted for.[1] The reason assigned is puerile, since skilled miners are legion, and since any but skilled mining would be a breach of implied covenants, in the absence of express ones.

Lessees under a lease of an oil well, which by its terms continued as long as oil or gas could be produced therefrom in paying quantities, abandoned the well because of the failure of the output, and afterwards sought to renew the lease, and were refused; they assigned the original lease, and it was held that the assignee acquired no title.[2] The full language of this lease is not given, and we must therefore presume that there were provisions justifying the decision, the reasons being otherwise obscure. But, irrespective of the right to assign, change of the personnel of a partnership does not operate as a forfeiture of the lease.[3]

§ 1342. Assignment by lessor — Effect.— What seems to be an indisputable proposition was decided in Kentucky, to the effect that all the rights of a lessor under a mining lease may be assigned by him so as to vest in the assignee all the rights thereunder, including the power to thereafter sue for rights accruing under the lease, and the privilege to have a forfeiture declared.[4] But upon the assignment or

v. Wright, 18 W. Va. 507. See also Zane v. Fink, 18 W. Va. 693; Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222.

[1] Hodgson v. Perkins, 84 Va. 706, 5 S. E. Rep. 710, citing 2 Minor's Inst., p. 22. 6 (h); Barksdale v. Hairston, 81 Va. 764. In this case the instrument was declared to be a non-assignable license.

[2] Cole v. Taylor, 8 Pa. St. 246.

[3] In re Markle's Estate, 5 Pa. Dist. Rep. 47.

[4] Thompson v. Brownlie (Ky.), 45 S. W. Rep. 871.

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transfer of his interest by the lessor, of course his right to maintain an action against the lessee for a breach of covenants ceases.[1]

§ 1343. Lessee liable notwithstanding assignment of lease.— It is well settled, from the very nature of the contract relation, that the lessee is liable for all the covenants, notwithstanding the assignment.[2] The reason of this rule is obvious. The lessee, by the contract, expressly promises the lessor that the covenants will be kept. This promise is mutual, and an assignment or sale by the lessor of the property would in no way relieve him from his contract obligations with the lessee. He would stand as a guarantor that his successor would keep his covenants.[3] The lessee is in a similar position. An assignment of the lease, whatever the relationship between him and his assignee, will not discharge his obligations to his lessor. In the absence of assent he is still liable unconditionally.[4] For if such a rule could successfully be invoked, it would be, as aptly stated by the Pennsylvania court, "a new way of paying old debts which no court of justice can recognize."[5] It would not be difficult to imagine a case where a different rule should apply; as, for instance, where the assignment is made with the express written consent of the lessor, who agrees to take the promise of the assignee in lieu of that of the original lessee. In such case practically a new contract would be made, and of course the lessee would no longer be liable.

§ 1344. Lessee and his assignee equally liable.— But while the lessee is bound absolutely, as between him and the

[1] Stoddard v. Emery, 128 Pa. St. 436, 18 Atl. Rep. 339.

[2] Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. Rep. 799; Pittsburg Cons. Coal Co. v. Greenlee, 164 Pa. St. 549, 30 Atl. Rep. 489; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196.

[3] Washington Nat. Gas Co. v. Johnson, *supra*.

[4] Pittsburg Cons. Coal Co. v. Greenlee, *supra*.

[5] Id., quoting from Gas Co. v. Johnson, *supra*.

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lessor, this must not be construed as in any manner discharging the assignee from the obligation to perform all covenants which accrue during the occupancy of the premises by him;[1] and this regardless of any express promise on his part, in the written assignment, to keep such covenants, but arising from the privity of estate, by reason of the ownership and right to enjoy the benefit of the lease,[2] and because, as we shall presently see,[3] these are covenants running with the land. And this rule extends to an assignee of a lease which provides that the lessee will prosecute the oil business with due diligence for the common benefit of the parties;[4] and to the purchaser of a leasehold interest at sheriff's sale.[5] It will also bind the assignee of a lease to pay a stipulated yearly rental, provided as the penalty for failure to complete a well.[6]

§ 1345. **Limitations — Intermediate assignee.**— Each successive assignee of a lease is only liable for the performance, and responsible for the breaches, of the covenants which mature while he holds title.[7] Consequently, an assignee who acquires title after a covenant should have been performed, as, for instance, one who takes possession after a well should have been completed, is not liable for the performance of such covenant.[8] And this has been held to be the rule even though, as the Pennsylvania court puts it, "his assignment be to a beggar."[9] But while this would

[1] Fennell v. Guffey, 155 Pa. St. 38, Id., 39 Pa. St. 341, 20 Atl. Rep. 1048; Woodland Oil Co. v. Crawford, 55 Ohio St. 16, 34 L. R. A. 32.

[2] Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196, citing Watson C. & M. Co. v. Casteel, 73 Ind. 296; McDowal v. Hendrix, 67 Ind. 513; Gordon v. George, 12 Ind. 408; Stewart v. Long Island Ry. Co., 102 N. Y. 607, 8 N. E. Rep. 200.

[3] *Post*, § 1346.

[4] Bradford Oil Co. v. Blair, 113 Pa. St. 83, 4 Atl. Rep. 218.

[5] Aderhold v. Oil Well Supply Co., 158 Pa. St. 401, 28 Atl. Rep. 22.

[6] Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. Rep. 66.

[7] Bradford Oil Co. v. Blair, 113 Pa. St. 83, 4 Atl. Rep. 218.

[8] Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. Rep. 769; Negley v. Morgan, 46 Pa. St. 281; Borland's Appeal, 66 Pa. St. 470.

[9] Washington Natural Gas Co. v. Johnson, *supra;* Negley v. Morgan, *supra;* Borland's Appeal, *supra.*

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undoubtedly be the rule as between the assignee and lessor, we think it would depend upon the assignment itself whether it would apply equally as between the assignee and his assignor.

§ 1346. Covenants running with the land — Actual entry not necessary.— As intimated in a former section,[1] covenants to pay rent and royalty, as well as the other covenants in the lease, run with the land, and are payable by the constructive occupant.[2] And it is not material that the lessee or assignee has not in fact entered into possession of the land, if possession is open to him to enter if he chooses.[3] This right to rent is not waived as against either the lessee or his assignee by failure on the part of the lessor to demand it promptly when due.[4] And it is an unassailable rule that taking oil, by the assignee of the lessee, fixes the lessor's right to royalty from him.[5]

§ 1347. Summary — The doctrine of this sub-title restated.—From the matter outlined in this article we are justified in extracting the following conclusions as general principles of law:

First. That in the absence of covenants to the contrary, or a controlling custom which will be considered as read into the lease, or an intention to the contrary provable

[1] *Ante*, § 1344.

[2] Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. Rep. 196, quoting from and citing Taylor, Landl. & Ten., § 450; Walton v. Cronly's Adm'r, 14 Wend. 63; Walker v. Reeves, 2 Doug. 461; Williams v. Bosanquet, 1 Brod. & B. 238; Burton v. Barclay, 7 Bing. 745; Cook v. Harris, 1 Ld. Raym. 367; Babcock v. Scoville, 56 Ill. 461; Smith v. Brinker, 70 Mo. 148; Willi v. Dryden, 52 Mo. 319. Compare Fisher v. Guffey, 193 Pa. St. 393, 44 Atl. Rep. 452.

[3] Fennell v. Guffey, 139 Pa. St. 341, 20 Atl. Rep. 1048; Id., 155 Pa. St. 38, 25 Atl. Rep. 785; Springer v. Citizens' Gas Co., 145 Pa. St. 430, 22 Atl. Rep. 986; Aderhold v. Oil Well Supply Co., 158 Pa. St. 401, 28 Atl. Rep. 22; approved in Edmonds v. Mounsey, *supra*.

[4] Pittsburg Cons. Coal Co. v. Greenlee, 164 Pa. St. 549, 30 Atl. Rep. 489.

[5] Hankey v. Kramp, 12 Ohio C. C. 95; Taylor v. Peerless Ref. Co., 7 Ohio Dec. 368.

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within the rules of evidence, every mining lease is assignable.

Second. Parties may, and often do, make their leases non-assignable, and, of course, they are enforceable in the form they are made, but it will be enough to hold such instruments non-assignable as are expressly made so in form.

Third. There are some cases attempting to hold leases non-assignable, but a critical examination will demonstrate that they base their conclusions upon authorities found in the construction of licenses, where this rule very generally obtains. And this is the main distinction between licenses and leases, as we have attempted to demonstrate. The reason assigned by one court for this conclusion is that the contract is for skilled labor. But this ground is untenable. It is undoubtedly the law that all persons acquiring rights under the lease are bound by its terms until released by the lessor, or until he consents to an assignment which amounts to a release in terms. It may well be, indeed it is indisputable, that by the mere assignment the original lessee will not be relieved from liability as upon the covenants of the lease. But it will be enough to say that he remains a guarantor for their performance without declaring the lease non-assignable, in the absence of a provisory covenant making it so.

Fourth. Pennsylvania seems not entirely at peace with itself upon this question. It is safe to say, however, that better reasoned cases agree with the statements in the last preceding sub-head.

Fifth. As said before, all persons asserting rights under a lease are bound by its terms, independent of the covenants running with the land, all of which must, of course, be performed.

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CHAPTER III.

OF THE GENERAL WORKING BOND OR CONTRACT, AND OF TITLE RESTING UPON CONDITIONS, TO PERFORM LABOR IN NATURE OF CONDITION SUBSEQUENT.

§ 1355. Preliminary and introductory.
1356. The general working contract — Pay out of mine.
1357. Right to abandon work reserved — Pay out of proceeds.
1358. Purchase price payable from ore.
1359. Generally construed as options merely.
1360. Contract enforceable only in terms as made.
1361. Title resting upon condition.
1362. Performance of work as consideration — Damages for breach.
1363. Contrary rule where, by agreement, title rests on condition.

§ 1355. Preliminary and introductory.— There is a working bond or lease largely in use in the Rocky Mountain states and the states of the Pacific coast, which sometimes assumes the form of a lease, pure and simple, with a bond or contract for the conveyance of the title upon the performance of certain conditions and the making of certain payments. In many instances it is a contract or bond merely in form, with the additional stipulation that during its life-time, and pending the conveyance of the full title, certain work is to be performed. Sometimes it contains stipulations as to any ores taken out, and in other cases it is, in all its essential features, a requirement of the performance of certain dead work, which means certain prospecting or development work. In other cases the title is conveyed absolutely as to a portion of the claim, and as part of the same transaction a contract is entered into by the terms of which certain work is to be performed as a consideration for the deed, and the title is made to rest upon the performance of such work as a condition subsequent, either expressly or impliedly from the surrounding circumstances.

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Happily the courts have been called upon but few times to construe or determine the rights of the parties under these contracts, and there is to some extent a dearth of authority as to the rights of the parties in such cases.

A practice which is becoming more and more popular in the west is for the owner to give the prospective purchaser an option, the contract for which provides that a deed of the property may be deposited in escrow, to be delivered to the purchaser upon payment of the agreed price, or returned to the grantor in case of failure.

§ 1356. The general working contract — Pay out of mine.— As we have stated, parties frequently enter into contracts for mining operations whereby the party doing the work agrees to get his pay therefor from the proceeds of the mine. In such cases primarily they will be held to the exact letter of their contract as they have made it. But where the action of one party to the contract puts it beyond his power to perform, it constitutes a breach of the contract and the other party may be compensated in damages. Thus, in a Nevada case, defendants owned mining property; plaintiff built a mill upon it which cost more than was anticipated, and in adjusting their differences it was agreed that plaintiff should get his pay out of the mine. The ore was refractory, and the mine never paid and was abandoned. Plaintiff sued defendant for the balance agreed upon. The court, in upholding the judgment of the lower court sustaining a demurrer to the complaint, says: "It is admitted that there have been no proceeds after payment of the expenses; and, more than that, it appears that the proceeds have fallen far short of paying the actual expenses. . . . It is not alleged nor does it appear that the Poe company failed to do anything which it should have done, or did anything which it ought not to have done under its contract. There is no allegation of fraudulent acts, or even errors of judgment. It worked its mine, and reduced its ores, as it agreed to do. In so acting, debts were contracted which it

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was unable to pay, and the result was a forced sale of the property." It was held that plaintiff was not entitled to recover.[1]

So where A. assigned to B. a certain interest in a lease of a gold and quicksilver mine for certain cash payments, the balance payable when two hundred and fifty flasks of quicksilver should be produced, it was held that, in the absence of a showing that B. had not used reasonable efforts to produce the quicksilver, A. was not entitled to recover.[2] So, where a lease was executed which did not forbid subletting or assigning, and provided for certain profits to go to the owner of the land, it was held that the sub-assignment did not so put it beyond the power of the lessee to perform as to make him liable as upon the original contract, and for damages.[3]

§ 1357. Right to abandon work reserved — Pay out of proceeds.— Where plaintiff was to drill a prospect hole a certain depth for a fixed amount, and there was a provision that, if he struck what was known as "conglomerate" or ironstone before reaching the required depth, he might abandon; and by another provision of the same contract he bound himself to bore any number of feet at four dollars per foot; and under this provision the defendant insisted that it was plaintiff's duty, at his election, which had been communicated, to continue to prosecute work, but plaintiff refused, and brought his action for the amount of work performed under the contract, the supreme court upheld the judgment of the lower court in his favor.[4] And a promissory note payable out of the proceeds of a mine, in the hands of the original payee, or not being negotiable, in any case may be defended against, on the ground that the mine has not produced.[5] But in order to make a promissory note,

[1] Toombs v. Cons. Poe M. Co., 15 Nev. 444. See also Sargent v. Linden M. Co., 55 Cal. 204.

[2] Ray v. Hodge, 15 Oreg. 20, 13 Pac. Rep. 599.

[3] Caley v. Portland, 12 Colo. App. 397, 56 Pac. Rep. 350; Wolf v. Marsh, 54 Cal. 228; Sargent v. Linden M. Co., *supra*.

[4] Lambert v. Fuller, 88 Ill. 261.

[5] Worden v. Dodge, 4 Denio, 159; Aspach v. Bast, 52 Pa. St. 356;

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or any other agreement for wages, payable out of the proceeds of the mine, the parties must have expressly so agreed, for the law will not imply any such agreement.[1]

§ 1358. Purchase price payable from ore.— Manifestly the same rule controls with reference to sales of the mine or any part thereof, and the purchase price is payable from ore or other proceeds.

Thus, where A. and B. enter into a contract whereby A. sells certain mining property to B. for certain cash payments, and the balance is stipulated to be paid out of the proceeds of ore sales of the mine; and afterwards B. releases a large portion of the ground embraced in the contract under an adverse claim and later conveys a large portion of the claim and surrenders the management of it to C., B. has thereby put it out of his power to perform the contract according to the terms thereof, and the payment is due.[2] A contract providing for payment out of the net proceeds of the mine does not impliedly require that the mine will be continuously operated, since the court cannot make contracts for the parties.[3]

§ 1359. Generally construed as options merely.— Owing to the speculative nature of mining operations it may be laid down as a general rule that these bonds or options to purchase, working bonds, or bonds for deeds, by whatever name they may be known or called, are generally unilateral in their nature; that is to say, the lessee or obligee of the bond has the right and option to purchase, but is not bound to do so. Perhaps as extreme a case as will be found in the books recently arose in Colorado, where A. owned a

Eckle v. Murphy, 15 Pa. St. 488; Myers v. South Feather River Water Co., 14 Cal. 268. See Tempest v. Ord. 1 Madd. Ch. 59; Pennsylvania Co. v. Brady, 14 Mich. 260; s. c., 16 Mich. 322. See Tuck v. Downing, 76 Ill. 71; Morgan v. Skiddy, 62 N. Y. 319.

[1] Sargent v. Linden M. Co., 55 Cal. 204.

[2] Linn v. Butler, 8 Colo. 355, 8 Pac. Rep. 588.

[3] Hawkes v. Taylor, 70 Ill. App. 255.

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half interest in the title bond and lease of a mine, and conveyed it to B. in consideration of fifteen hundred dollars cash and the performance of the conditions of the lease and bond. B. agreed to pay the bond, and in the event of failure so to do to forfeit all payments and improvements as liquidated damages. He elected to forfeit. In an action by A. for an interest in the property it was held that the right was dependent upon B.'s election to take up the bond, and that it was an option merely.[1] It may be said in passing that many of the covenants of the contract, especially between plaintiff and defendant, indicated a purpose and an intention to take up the bond and pay for the mine, while the original contract with the owner was an option merely. And, while the court did not consider this feature of the case in its opinion, it is quite apparent that A. and B. could not be bound by higher terms than was A. with the owner of the land.

§ 1360. Contract enforceable only in terms as made.— Pursuing the same line of thought contained in the last preceding section, it may be said, and it is a rule controlling the interpretation of all bonds and contracts, that men are only bound by the terms of the contract as made, and neither party nor the courts can read into the contract engagements and obligations which it does not contain, or which are not fairly implied from its terms. Thus, in one case B. entered into a contract with C., by the terms of which C. was to obtain for B. a working bond and lease upon mining property the ultimate price of which should not exceed three hundred thousand dollars. C. obtained the lease and bond within the price named, but it contained a stipulation that all ore mined was to be left upon the dump and was not to belong to C. or his assigns until the mine was fully paid for, and the net proceeds were to be deposited to the credit of the owners. In an action by C. against B. for damages the court denied C.'s right to recover, using much subtile reasoning as to the

[1] Gold Coin M. & M. Co. v. Gourlay (Colo. App., 1901), 65 Pac. Rep. 410.

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meaning of an open and unopened mine, not necessary to the determination of the case, and basing the decision upon the ground that the parties had stipulated for the usual working bond and lease, which would give B. the right to work the mine in the usual way, while this restricted him to mining at his own expense and prohibited him from marketing the ore, except fifty tons, until the mine should be paid for. This not being what they bargained for, C. was not entitled to recover. In the course of its reasoning the court makes use of the following definition of the term "work" as applied to a mine: "In general, among miners, the phrase 'working a mine' means more than exploring or developing a mine. The right to work a mine is not simply the right to explore or develop a mine, but to do in regard to a mine what an owner might do. The agreement obtained by plaintiff limited the work to the exploration of the mining ground. In this particular the agreement was not of the character defendant stipulated for."[1]

§ 1361. Title resting upon condition.— Where the title to the property in question nominally passes to the grantee, but there is at the same time an agreement forming part of the consideration that the title is to become void in case of the non-performance of the condition, manifestly the old doctrine of estates upon condition must apply in such cases, and the estate become forfeited in case of non-performance. This rule was recognized in the federal court in a case arising in the western district of North Carolina.[2] In this case the court held that, under certain conveyances authorized by statutes which have abolished livery of seisin, a condition may be annexed to an estate, upon the breach of which the estate in the grantee will be defeated and at once revest in the grantor or his heirs, or revert to the third party to

[1] Bailey v. Bond, 77 Fed. Rep. 406. See also Bicknell v. Austin M. Co., 62 Fed. Rep. 432; First Nat. Bank v. Bissell, 4 Fed. Rep. 701; Real Del Monte M. Co. v. Pond M. Co., 23 Cal. 83; Buck v. Lodge, 18 Ves. Jr. 450, 14 M. R. 623.

[2] Adams v. Ore Knob Copper Co., 7 Fed. Rep. 634.

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whom limited, without any formal act of possession. Also that mere silent acquiescence in an act constituting a breach would not amount to a waiver.[1]

§ 1362. Performance of work as consideration — Damages for breach.— Where there is an absolute conveyance, and the performance of work is in the nature of consideration for it, rather than as a condition for a breach of which the estate is defeated, the remedy, in case of breach, is usually an action for damages.[2] And in such case, unless the facts are undisputed, or such that concerning them reasonable men cannot differ, the question whether the work has been performed according to contract is one of fact. But of course the construction of the contract itself is purely a question of law.[3] In the Missouri case just cited, the conveyance was absolute, and the contract accompanying it provided that the grantee should cause a shaft to be sunk "to the depth of five hundred feet upon the vein of ore cropping out on said claim." It was admitted that at the depth of three hundred and thirty feet the ore was exhausted and further operations discontinued. After instructing the jury to return a general verdict for the plaintiff, and what would be the measure of damages, the trial court further instructed them that if they believed from the evidence that the plaintiff would not have been benefited by the sinking of the shaft to the depth specified, their verdict might be for nominal damages only. This was the verdict returned and the plaintiff appealed. The supreme court, by reading into the contract something it did not contain, arrived at the conclusion that it was the intention of the parties that whenever the ore in the vein should be exhausted, further sinking should cease. Of the two evils, we think the trial court's position is the lesser; but how much better than either one it would have been to hold the

[1] For the discussion of a similar rule as applied to the failure of the lessor to demand rent, see *ante*, § 1346.

[2] Woodworth v. McLean, *infra;* Davis v. Eames, *infra.*

[3] Woodworth v. McLean, 97 Mo. 325, 11 S. W. Rep. 43; Davis v. Eames (Cal.), 35 Pac. Rep. 566.

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parties bound by their contract, which was free from ambiguity, or liable for its breach. This is substantially what the California court did,[1] and is in harmony with law, reason and common sense. Unless parties intend to be bound by their contracts they should not make them.

§ 1363. Contrary rule where, by agreement, title rests on condition.— As was noted in a preceding section, and from considerations of manifest justice, as well as following the established law relative to estates upon condition, wherever, by the agreement of the parties, the title is made to rest upon condition that certain work will be done, or where that forms the consideration in its entirety, or where the parties have agreed that if after doing certain work they do not desire to hold the property they will reconvey it, or if these facts can be gleaned from the surrounding circumstances, the estate thus created is one upon condition and no ultimate title passes until the full performance thereof.[2]

Somewhat at variance with this doctrine, the supreme court of California, in a case where defendant agreed to perform certain labor in payment for certain interests in a mining claim, and there was no stipulation providing that in case of forfeiture by failure to work, a reconveyance would be made, held that there was no obligation to reconvey.[3] But in a later case the court, while following the former one, plainly intimated that if the intention of the parties, as gleaned from the instrument and the surrounding circumstances, showed that they intended that, upon a forfeiture by breach of condition, a reconveyance was to be made, the rule would be different.[4] Likewise in a Tennessee case a conveyance of a mining interest being forfeitable if at the end of the year defendant could not or would not mine, the defendant defeated a reconveyance by proof that it could and would mine.[5]

[1] Davis v. Eames, 35 Pac. Rep. 566.

[2] *Ante*, § 1361. See also Adams v. Ore Knob Copper Co., 7 Fed. Rep 634; Downing v. Rademacher (Cal.), 62 Pac. Rep. 1055.

[3] Lawrence v. Gaiety, 78 Cal. 322, 20 Pac. Rep. 382.

[4] Downing v. Rademacher, *supra*.

[5] Barnard v. Roane Iron Co., 85 Tenn. 139, 2 S. W. Rep. 21.

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CHAPTER IV.

OF EXECUTORY CONTRACTS FOR DEEDS, LEASES AND SIMILAR INSTRUMENTS.

§ 1370. Specific performance of executory contracts for leases and similar instruments.
1371. Same — An example — That is certain which can be made certain.
1372. Mere offer to perform does not satisfy.
1373. Unreasonable delay.
1374. Statute of frauds — How affects executory contracts.
1375. Entitled to what they bargain for.
1376. Time essential.
1377. Same — Mining property and other property of fluctuating value.
1378. Same — Distinction between option to purchase and contract of sale.
1379. Deed sometimes held only to be a contract.
1380. Nominal damages satisfying.
1381. Remedies as to mining property must be diligently pursued — Laches bars the right.

§ 1370. Specific performance of executory contracts for leases and similar instruments.— Agreements for lease are not essentially different from other contracts except as to the subject-matter. Owing to the peculiar nature of the undertaking they are generally strictly construed.[1]

Specific performance of a contract for a lease has been repeatedly enforced, as it applies to real estate generally, and there is no reason why the same doctrine should not apply, and indeed it does apply, to mining leases, the only requirement being that it be such an agreement as to be

[1] Cochrane v. Justice M. Co., 16 Colo. 415, 26 Pac. Rep. 780; Kille v. Reading Iron Works, 141 Pa. St. 430, 21 Atl. Rep. 666; Hawley v. Brumagin, 33 Cal. 394; Saffern v. Butler, 21 N. J. Eq. 410; Hurd v. Gill, 45 N. Y. 341.

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capable of enforcement. In Michigan it has been upheld, but under a statute authorizing it.[1] In Colorado the supreme court recently had this question before it, and enforced specific performance of a contract existing in propositions and acceptances. The court, in passing upon the question, used this language: "If one makes to another an offer, verbal or written, direct, by letter or by telegram, implying nothing to be done except to assent or decline, and the latter accepts, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract."[2]

§ 1371. Same — An example — That is certain which can be made certain.— In a Colorado case a company advertised to lease certain of its mining property; plaintiff, who had formerly had a lease upon it, made a proposition to lease the whole property at a certain royalty for a fixed period, and proposed to spend a certain amount each month in development work, lease to date from the time of commencing work, "settlements as usual;" defendant's board of directors met, and by vote decided to accept the proposition, and, in accordance therewith, its president wired plaintiff that his proposition was accepted; defendant had a lease prepared requiring a shaft six hundred feet deep at a place to be designated by it, and requiring plaintiff to pay certain taxes, and also containing the following requirement of the plaintiff: "Shall use his best ability and endeavors to obtain the best price for all ores mined under this lease, . . . and whenever the lessor can obtain better terms as to treatment and sale of the ores mined than the lessee, the lessor shall have the right to dispose of the ore so as to realize greater profit to lessor and lessee." The court, in passing

[1] Grummett v. Gingrass, 77 Mich. 369, 43 N. W. Rep. 999.

[2] Cochrane v. Justice M. Co., 16 Colo. 415. See also Smith v. Coleby, 106 Mass. 562; Bishop, Contracts, 322; Cheeney v. Transportation Line, 59 Md. 557; Highland Co. v. Rose, 26 Ohio St. 411; Wells v. Railroad Co., 30 Wis. 605.

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upon the case, declared these provisions as inserted in the proposed lease to be unreasonable and unheard of, and not within the terms of the proposition; also that the words "settlement as usual," as contained in the proposal, meant either as had been the practice between the parties, or according to the custom of the vicinage; and that, viewed in this light, the proposal was sufficiently definite, and its acceptance constituted a valid contract for a lease; that plaintiff's proposed lease in accordance therewith as tendered should have been executed, and that plaintiff was entitled to specific performance accordingly.[1]

§ 1372. Mere offer to perform does not satisfy.— It is only announcing the general rule to say that where a lease of coal or other mineral lands contains an option to purchase at any time during the lease period, upon notice to the other party, the option is not exercised so as to complete the contract on the part of the would-be purchaser by mere offer to purchase and notice of such intention; nor until the purchase-money has been tendered and the tender kept good.[2] Granting specific performance of any contract being so largely in the discretion of the court, it will generally require the person seeking the same to act promptly in asserting his rights and to be himself without fault.

§ 1373. Unreasonable delay.— As an illustration of the principle announced in the last section, where one who has agreed to obtain title to a coal mine and lease it to another

[1] Cochrane v. Justice M. Co., 16 Colo. 415, 26 Pac. Rep. 780, citing Kennedy v. Lee, 3 Mer. 441; Fowle v. Freeman, 9 Ves. 351; Crossley v. Maycock, L. R. 18 Eq. 180; Thomas v. Dering, 1 Keene, 729; Gibbons v. Board, 11 Beav. 1; Skinner v. McDouall, 2 De Gex & S. 265; Jaques v. Miller, 6 Ch. Div. 153; Pratt v. Hudson River Ry. Co., 21 N. Y. 305; Mackey v. Mackey, 29 Gratt. 158; Cheney v. Transportation Line, 59 Md. 557; Wharton v. Stoutenbergh, 35 N. J. Eq. 266; Blaney v. Hoke, 14 Ohio St. 292; Clark v. Clark, 49 Cal. 586. See also Haywood v. Cope, 25 Beav. 140; Smith v. Colby, 106 Mass. 561.

[2] Flynn v. White Breast Coal & Iron Co., 72 Iowa, 738, 32 N. W. Rep. 471; Grummett v. Gingrass, 77 Mich. 369, 43 N. W. Rep. 999.

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does not tender possession to the lessee until nearly five years have elapsed, during which time nearly six thousand tons have been taken from the mine, and the machinery has greatly deteriorated in value, the lessee is justified by the delay in refusing the lease.[1]

§ 1374. Statute of frauds — How affects executory contracts.— It has been said that the statute of frauds is the *pons asinorum* of the courts. And from the unfortunate disposition of some courts to shut their eyes to the relationship which any given principle of the law bears to all others, this would seem to be so. But, happily, there are other courts not transfixed by the circumstance that "the legislature has spoken," and created a fetish which all must worship. It is now firmly settled by all courts whose opinions are worthy of consideration that part performance of a parol contract, otherwise void by statute, takes it out of the operation thereof. Thus, a parol agreement between the owner of the land and his lessee on the north side of the road, whereby the owner agrees to lease to said lessee certain lands on the south side of the road, provided he can develop coal theron, and the lessee opens and develops a pit and does other work, is not affected by the statute of frauds, and must be specifically performed.[2] So, payment of rent in accordance with the proposed lease was held a sufficient part performance to take an agreement for lease out of the statute.[3] In this case the payment was evidenced by a receipt which only showed the amount received and the premises, but not the terms of the lease itself.

§ 1375. Entitled to what they bargain for.— The rule that in mining contracts, whether for lease or deed, the par-

[1] Kille v. Reading Iron Works, 141 Pa. St. 440, 21 Atl. Rep. 666; Colorado Fuel & Iron Co. v. Adams (Colo. App.), 60 Pac. Rep. 367.

[2] Haywood v. Cope, 25 Beav. 140; Heilman v. Weinman, 139 Pa. St. 143. See Gordon v. Swan, 45 Cal. 564; Rerick v. Kern, 14 S. & R. 267, 16 Am. Dec. 497; *post*, § 1416.

[3] Nunn v. Fabian, 35 L. J. Ch. 140, L. R. 1 Ch. 35; *post*, § 1396.

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ties are entitled to exactly what they contract for, is thus illustrated by the supreme court of New Hampshire: "If the purchaser demand such a deed as the contract calls for, and the vendor refuses to give it, but insists on his receiving a different and inferior title, the contract may be regarded as broken, and the purchaser may sue at once and recover the money paid."[1]

§ 1376. Time essential.— For obvious reasons, in mining operations, owing to the fluctuating character of the property and its product, and the change which a few hours' work in the mine may effect, it has become well recognized that time is material and essential in all executory contracts affecting the purchase or lease of mines. And the failure of either party to strictly perform his side of the contract within the time required, generally releases the other or entitles him to specific performance, as the case may be.[2]

§ 1377. Same — Mining property and other property of fluctuating value.— Mr. Fry, in his work on Specific Performance, aptly states the rule applicable to mining contracts when he says: "The nature of all mining transactions is such as to render time essential, for no science, forethought or examination can afford a sure guaranty against sudden loss, disappointment and reverses."[3] And the supreme court of Idaho announced what should be the

[1] Reddington v. Henry, 48 N. H. 278, citing (which see) Foote v. West, 1 Denio, 544; Baker v. Robbins, 2 id. 136; Camp v. Morse, 5 id. 161; Lawrence v. Taylor, 5 Hill, 107; Judson v. Waas, 11 Johns. 525; Little v. Paddleford, 18 N. H. 167; Swan v. Drury, 22 Pick. 485. See Cochrane v. Justice M. Co., 16 Colo. 415, 26 Pac. Rep. 780; Pease v. Brown, 104 Mass. 291; United Mines Co. v. Hatcher, 79 Fed. Rep. 517.

[2] Durant v. Comegys, 2 Idaho, 926, 28 Pac. Rep. 425; Dikeman v. Sunday Creek Coal Co., 184 Ill. 546, 54 N. E. Rep. 864; Waterman v. Banks, 144 U. S. 394; Presidio M. Co. v. Bullis, 68 Tex. 581, 4 S. W. Rep. 860; Idaho G. M. Co. v. Union G. M. Co. (Idaho), 47 Pac. Rep. 97; Lindl. Mines, sec. 859, pp. 1110, 1111; Fry on Specific Performance, § 716: Waterman, Specific Performance, § 460.

[3] Fry on Specific Performance, § 716.

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general rule, to the effect that a court of equity, with all its great and varied power, will not enforce specific performance of a mining contract, unless the party seeking it has in all respects complied with his part of the contract.[1] This because of the fluctuating character of mining property.

§ 1378. Same — Distinction between option to purchase and contract of sale.— There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case, of course, the mere lapse of time, with the contract unperformed, does not entitle either party to refuse to complete it,[2] and therefore time is not of the essence of the contract. But where the contract is merely an option, generally without consideration, and especially as applied to mining property, of course, as pointed out in the last preceding sections, time is of its essence, and the prospective purchaser must act promptly within the time specified or his right to purchase is gone. This rule was recently ably illustrated by the supreme court of the United States in a case wherein the court reversed a judgment of the circuit court for the northern district of California decreeing specific performance of an option to purchase. The facts showed that the option was given in 1881 by R. W. Waterman to his brother, as a sort of security for moneys advanced, which, however, were afterwards repaid. The

[1] Settle v. Winters, 2 Idaho, 199, 10 Pac. Rep. 216. See also Pom. Specific Performance, § 385; Waterman, Specific Performance, 460; Fry, Specific Performance, §§ 718, 718; Green v. Covillaud, 10 Cal. 317, 330; Jennison v. Leonard, 21 Wall. 302; Goldsmith v. Guild, 92 Mass. 239; Christie's Appeal, 85 Pa. St. 468; Prendergast v. Turton, 1 Y. & C. Ch. 98; Langdon v. Fogg, 18 Fed. Rep. 5; Morgan v. Skiddy, 62 N. Y. 319; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; *post*, § 1381.

[2] Ranelagh v. Melton, 2 Drew. & S. 278. See also *post*, § 1380.

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instrument provided that conveyance would be executed at any time within one year, upon demand, subject to his portion of the expenses. No demand for a conveyance was made within the year, nor until after the death of the party to whom it was given, when his executrix sought to compel one. The court, after calling special attention to the fluctuating character of mining property, held time to be of the essence, and ordered the action dismissed.[1]

§ 1379. Deed sometimes held to be only a contract.— Construed in the light of the circumstances surrounding its execution, a deed executed and delivered and placed on record may sometimes not pass the entire title and will be treated as an executory contract of sale. This is illustrated in a case in Montana, where the parties entered into an agreement for the sale of mining property, and a deed was executed, to be placed in the hands of a bank as escrow, pending the payment of the entire purchase-money, one hundred thousand dollars being paid down; the parties in England, desiring an abstract of title, procured a duplicate deed to be executed by the vendor and to be placed on record in order to enable them to promote the enterprise; it was not intended that this should in any wise alter the original contract as evidenced by the first deed placed in escrow, and the court, giving effect to their intention, held that it did not change the contract nor pass the title.[2]

Where the owners of a mining claim entered into an agreement to convey it to another party, pursuant to which agreement a deed was simultaneously executed and delivered to said party, who thereupon executed a deed of the same property and placed it in escrow to be delivered to the

[1] Waterman v. Banks, 144 U. S. 394, following Taylor v. Longworth, 14 Pet. 172, citing Prendergast v. Turton, 1 Young & C. Ch. 110; Doloret v. Rothschild, 1 Sim. & Stu. 590, 598; Fry, Specific Performance, §§ 714, 715; Pom. Contracts, 884, 885; Brown v. Covillaud, 6 Cal. 566; Green v. Covillaud, 10 Cal. 317, 324; Magoffin v. Holt, 1 Duv. 95. See also Porter v. Banks, 144 U. S. 408.

[2] Minah Cons. M. Co. v. Briscoe, 47 Fed. Rep. 276.

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owners, upon the failure of such party to perform the conditions of the escrow, it was held that the three instruments amounted merely to an agreement to sell, and, until the conditions of the escrow were performed, were not sufficient to divest the original owners of title to the property, and that they were qualified to maintain ejectment proceedings against third parties.[1]

§ 1380. Nominal damages satisfying. — The Pennsylvania superior court in 1898 held that for a breach of an agreement to buy an interest in an oil lease the vendor can only recover nominal damages where he retained the property, without being obliged to make a sale of it at a lower price, and made no tender of a conveyance;[2] and to be enforceable, the contract must be mutually binding.[3]

§ 1381. Remedies as to mining property must be diligently pursued — Laches bars the right. — As we have endeavored to show in the preceding sections,[4] owing to the fluctuating nature of mining property as respects its value, it would be unjust to permit parties to sleep upon their rights and then seek to assert them after the property had become developed by the energy and expense of another. Property worth but little to-day might, by the discovery of large ore bodies, become worth many millions in a few days, and to permit the assertion of supposed rights after unreasonable delay would manifestly be unconscionable and unjust. This principle was recognized by the supreme court of the United States in an early case in the following words: "Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars at its fair value, may, by the natural changes of a week

[1] Conway v. Hart, 129 Cal. 480, 62 Pac. Rep. 44.

[2] Carner v. Peters, 9 Pa. Super. Ct. 29, 43 W. N. C. 261.

[3] Geiger v. Green, 4 Gill (Md.), 472; Tyson v. Watts, 1 Md. Ch. 13. See also Stage v. Boyer, 183 Pa. St. 560, 38 Atl. Rep. 1085.

[4] *Ante*, §§ 1276–1278.

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or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."[1]

Again, in a case following the one mentioned in the last paragraph, the court say: "Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights."[2]

It is not enough that plaintiff commences his suit in due time, but he must prosecute it with diligence;[3] and in all such cases the court will refuse its aid to set aside a supposed illegal transfer to enforce specific performance, or permit the assertion of a supposed right long dormant.[4]

[1] Twinlick Oil Co. v. Marbury, 91 U. S. 587, 592, 23 L. ed. 328, 331; followed in Johnston v. Standard M. Co., 148 U. S. 360, 37 L. ed. 148. See also Kinney v. Cons. Va. M. Co., 4 Sawy. 388, 14 Fed. Cas. 611; Great West M. Co. v. Woodmas of Alston M. Co., 14 Colo. 90, 23 Pac. Rep. 908; Galligher v. Cadwell, 145 U. S. 368; Hall v. Russell, 3 Sawy. 506, 11 Fed. Cas. 248.

[2] Johnston v. Standard M. Co., *supra*, citing (which see) Felix v. Patrick, 145 U. S. 317, 334, 26 L. ed. 719, 727; Hoyt v. Latham, 143 U. S. 553, 567, 36 L. ed. 259, 265; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134; Great West M. Co. v. Woodmas of Alston M. Co., *supra*. See also Grymes v. Sanders. *infra*.

[3] Johnston v. Standard M. Co., *supra;* Hawes v. Orr, 10 Bush, 437; Ehrman v. Kendrick, 1 Met. (Ky.) 149; Watson v. Wilson, 2 Dana, 404; Ferrier v. Busick, 6 Iowa, 258; Bybee v. Summers, 4 Oreg. 361.

[4] Johnston v. Standard M. Co., *supra; ante*, § 1377; Norway v. Rowe, 19 Ves. 144; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 332; Grymes v. Sanders, 93 U. S. 55.

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CHAPTER V.

OF MINING LICENSES IN GENERAL.

ARTICLE A.

Distinctions from Lease — General Features.

§ 1390. Mining licenses in general — Nature and character — Definition.
1391. Same — Ordinarily license not exclusive — An illustration.
1392. Limitations — Purpose and extent of license — When exclusive.
1393. What a license, deed, lease, contract.
1394. Wherein license differs from lease generally.
1395. How created — Writing — Parol.
1396. Statute of frauds.
1397. Licensee tenant at will — In such case license revocable and countermandable.

§ 1390. Mining licenses in general — Nature and character — Definition. — A mining license is an authority to go upon the land of another and to mine or otherwise secure the mineral contained therein, whether in the form of ore, coal, oil or gas, and appropriate the same to the use of the licensees, under such circumstances as that the act would be a trespass except for such authority, and generally carrying no permanent interest in the land.[1]

[1] Norway v. Rowe, 19 Ves. 158; Feniman v. Smith, 4 East, 107; Wood v. Leadbitter, 13 M. & W. 838; Bird v. Higginson, 2 Ad. & El. 696; s. c., 6 id. 824; Ruffey v. Henderson, 17 Q. B. 574; Doe v. Wood, 2 Barn. & Ald. 724; Lynch v. Seymour, 15 Can. Sup. Ct. 341; Tupper v. Annand, 16 id. 718; Gesner v. Cairns, 2 Allen, 595; Grubb v. Baird, 2 Wall. Jr. 81, 11 Fed. Cas. 89; Rhodes v. Otis, 33 Ala. 578; Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871; Bracken v. Rushville, 27 Ind. 346; Beatty v. Gregory, 17 Iowa, 109; Harkness v. Burton, 39 Iowa, 101; Cook v. Stearns, 11 Mass. 534; Arnold v. Richmond Iron Works, 5 Cush. 502; Hill v. Cutting, 118 Mass. 110; Hartford Iron Co. v. Cambria Iron Co., 93 Mich. 93; Boone v. Stover, 66 Mo.

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The law of licenses has grown out of mining operations more than any other single field of human industry; and while the subject is one deserving attention in a special work, in view of its unsettled and unsatisfactory condition, the subject, so far as it relates to mining operations, will be specially treated here. As said by Blanchard & Weeks in their Leading Cases on Mines: "The law in relation to mining licenses is in many respects in an extremely unsatisfactory condition, and perhaps, in view of its expressly unsettled state and the conflicting decisions upon the subject, no better or safer advice can be given to the miner than this: He should never rely upon a license if it be possible for him to obtain a lease."[1]

§ 1391. Same — Ordinarily license not exclusive — An illustration.— By an instrument in writing the owner of land conveyed to C. a fire brick manufactory, with power to dig fire clay from certain lands for a term; by a subsequent deed he conveyed to B. the coal mines and seams of coal, also "all mines, seams, veins or beds of iron stone and fire clay found in connection with such coal seams as are workable as coal seams," under the same lands as those described in C.'s license. C. undertook, through an old pit, to open a seam known as the "stone coal seam," and secure the fire clay therein. Previously to this B. had sunk a pit through the "stone coal seam," and had taken samples therefrom which C. tested, and had also sold some of the fire clay

430; Lockwood v. Lunsford, 56 Mo. 68; Lee v. McLeod, 12 Nev. 280; Woodbury v. Parshley, 7 N. H. 237; Dodge v. McClintock, 47 N. H. 383; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Silsby v. Trotter, 29 N. J. Eq. 228; Manganese Iron Co. v. Trotter, 29 N. J. Eq. 561; Hurd v. Gill, 45 N. Y. 341; Wilson v. Chalfant, 15 Ohio St. 248; Snyder v. Vaux, 2 Rawle, 423; Funk v. Haldeman, 53 Pa. St. 29; Johnston Iron Co. v. Cambria Iron Co., 32 Pa. St. 241; Big Mountain Coal Co.'s Appeal, 54 Pa. St. 361; List v. Cotts, 4 W. Va. 543; Mapel v. John, 42 W. Va. 80, 24 S. E. Rep. 608; Ganter v. Atkinson, 35 Wis. 48; Tipping v. Robbins, 37 N. W. Rep. 427; Smith v. Jones, and Smith v. Forbes (Utah), 60 Pac. Rep. 1104.

[1] Blanchard & Weeks, Lead. Cas., p. 487.

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to C.; after C. had incurred considerable expense in sinking a pit, but before he reached the stone coal seam, B. notified him that such would be an invasion of his rights; C. filed a suit for injunction against B., seeking to restrain him from working any seam under the ground to which his license applied. The vice-chancellor granted the writ, but it was reversed upon the grounds — first, that in construing the words "coal seams workable as coal seams," regard must be had to the power referred to in the lease, which showed that the stone coal seam was workable at a profit when both coal and fire clay were taken into account, and both were, therefore, included in B.'s lease; second, that C.'s license was not exclusive, and the licensor could, therefore, deal with the property in any manner he saw fit, not inconsistent with the terms of the license; third, that B.'s possession was prior to that of C., and that, therefore, the latter could not restrain him.[1]

§ 1392. Limitations — Purpose and extent of license, when exclusive.— It would be hardly necessary to state that the license will be strictly limited to its express purpose and to the express objects sought to be impressed with it. Thus, in an Iowa case it was held that where a license to mine a particular vein was given, it was not permissible to search through the stratum into another vein.[2] And, as we have seen, it will be restricted to the particular interests of the licensor.[3] It is not generally exclusive, but will be exclusive as to the particular part of the mine in which the licensee is permitted to work in the particular case.[4] And the possession of the licensee can never be adverse.[5] These licenses are sometimes, but not always, controlled by custom. But of course, in such cases, the custom must be reasonable,

[1] Carr v. Benson, L. R. 3 Ch. 524. See also *post*, § 1406.

[2] Upton v. Brazier, 17 Iowa, 153.

[3] Omaha, etc. Co. v. Tabor, 13 Colo. 41, 16 M. R. 184, 21 Pac. Rep. 926.

[4] Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241. See Glonninger v. Franklin Coal Co., 55 Pa. St. 9. 9 M. R. 273.

[5] Desloge v. Pearce, 38 Mo. 588. 9 M. R. 247.

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of universal application, and so widely known and universally recognized as to create the presumption that the parties contracted with reference to it.[1]

The Iowa court took the position that these licenses are terminable by notice.[2] And, of course, this would generally be the rule as to all licenses except executed ones, that is, where permanent, valuable improvements have been the result of the execution. But wherever they may be revoked by notice, they are presumed to continue until so revoked.[3] And the doctrine is universal that they are a complete defense to all acts done under them. This has become elementary.

§ 1393. What a license, deed, lease, contract.— We have already seen that parties and courts sometimes disagree as to the name which ought to be given to a particular instrument. Sometimes they call it a lease or deed, but the courts are compelled to construe it with reference to the language used and the surrounding circumstances, and the intent gleaned therefrom, rather than the name with which it is christened. Thus, in a Canada case the instrument was called a lease, and the lessee was given exclusive right for ten years to enter, dig, mine and carry away iron ores upon an agreed royalty, with elaborate covenants as to timber, taxes and preventing nuisances, provisions for terminating before the term, and for quiet enjoyment. The lessor, under the statute of Anne,[4] claimed a lien for a year's rent as lessor. It was held by an evenly-divided court, and without much show of reason, that the instrument was a license and no lien existed.[5]

In California a quitclaim deed was held to be a mere

[1] Bush v. Sullivan, 3 G. Greene, 344, 9 M. R. 214; Beatty v. Gregory, 17 Iowa, 109, 9 M. R. 284.

[2] Bush v. Sullivan, *supra*.

[3] Keeler v. Green, 21 N. J. Eq. 27.

[4] Stat. 8 Anne, ch. 14, sec. 1. This is the statute giving the lessor a lien upon the property of the lessee for rent, and probably the parent of all modern statutes.

[5] Lynch v. Seymour, 15 Can. Sup. Ct. Rep. 341.

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license to mine;[1] and further, which is indisputable and unnecessary to the decision of the case, that the grantor could acquire an outstanding superior title in opposition to that conveyed by a quitclaim deed.[2] In Utah, parties entered into a contract of purchase and sale, absolute in form, except that payment was to be made only out of the gold dust produced from the claim, and it was held to be an option merely, coupled with a license to work.[3]

§ 1394. Wherein license differs from lease generally. There is a wide distinction between a lease of mines and a right to work them. The former is a distinct conveyance of an actual interest or estate in lands for a term long or short,[4] while the latter is simply an authority to do a certain act or series of acts upon another's land without possessing any estate therein;[5] a mere incorporeal hereditament,[6] to be exercised in the lands of others.[7]

§ 1395. How created — Writing — Parol.—From the very nature of a license, when the definition is correctly understood,[8] there would seem to be no question that it may be created either by writing or orally. There is, however, consider-

[1] Baker v. Clark, 128 Cal. 181, 60 Pac. Rep. 677.

[2] Ibid., citing Lord v. Sawyer, 57 Cal. 65; Dorland v. Magilton, 47 Cal. 485; Franklin v. Dorland, 28 Cal. 180; Garibaldi v. Shaddock, 70 Cal. 512, 11 Pac. Rep. 778.

[3] Smith v. Jones, and Smith v. Forbes (Utah), 60 Pac. Rep. 1104.

[4] Heywood v. Fulmer (Ind., not off. rep.), 32 N. E. Rep. 574, 18 L. R. A. 491, 495, and authorities.

[5] 3 Kent Com. 452, a profit *a prendre* which may be held apart from the possession of the land; Chicago, etc. Oil Co. v. United States Petroleum Co., 57 Pa. St. 83; Johnstown Coal & Iron Co. v. Cambria Coal & Iron Co., 32 Pa. St. 241; Cobb v. Davenport, 3 Vroom (N. J.), 389.

[6] Bainb. Mines (1st Am. from 3d Lon. ed.), p. 261; Am. & Eng. Enc. Law (1st ed.), vol. 15, p. 594, note 3; Collier on Mines, pp. 8, 9; McSwinney, Mines, 249; Brandt v. McKeever, 18 Pa. St. 71; Funk v. Haldeman, 53 Pa. St. 229; Grove v. Hedges, 55 Pa. St. 504; Grubb v. Bayard, 2 Wall. Jr. 81, 11 Fed. Cas. 89.

[7] Bainb. Mines, 261; Harlan v. Lehigh Coal Co., 25 Pa. St. 287; Armstrong v. Caldwell, 53 Pa. St. 284; Brown v. Corey, 43 Pa. St. 495.

[8] *Ante*, § 1395.

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able respectable authority, especially among the older cases and text-writers, holding a writing to be necessary.[1] Mr. Bainbridge bases his reasoning that this is especially true concerning mining licenses, upon the ground that such a license being a privilege to enter upon and remove the ores and minerals from the estate — to commit waste, as it were,— it is such an interest in the land that a writing is necessary to take it out of the statute of frauds. But it must be remembered, as we have elsewhere seen,[2] that mining in the proper manner is not considered waste at all. This being true, it must follow that mere permission to go upon the land, or a certain specified portion thereof, and extract and market the product, but conveying no interest in the land itself, may be given by parol. This rule as applied to the general law of real estate has been recognized by a long line of decisions, and has also received express recognition in several of the mining cases.[3] We will elaborate further upon the nature of the privilege thus granted in a subsequent section.[4]

§ 1396. Statute of frauds.— If the reasoning in the last section is sound, it must be apparent that a mere license is not ordinarily void under the statute of frauds for want of a written memorandum or part performance, especially if it

[1] Bainb. Mines, pp. 119, 226; Wood v. Leadbitter, 13 M. & W. 858; Bird v. Higginson, 2 Ad. & El. 696; s. c., 6 Ad. & El. 824; Holmes v. Sellor, 3 Levinz, 505; Fentiman v. Smith, 4 East, 107; Hawlins v. Shippam, 5 B. & C. 221; Cocker v. Cowper, 1 Cr. M. & R. 418; Wallace v. Harrison, 4 M. & W. 538; Ruffey v. Henderson, 17 Q. B. 574, 21 L. J. Q. B. 49; Cook v. Stearns, 11 Mass. 534; Woodbury v. Parshley, 7 N. H. 237; Mumford v. Whitney, 15 Wend. 380; Babcock v. Utter, 1 Keyes, 397; Wilson v. Chalfant, 15 Ohio St. 248; Dark v. Johnston, 55 Pa. St. 164, 9 M. R. 283, 93 Am. Dec. 732.

[2] *Ante*, § 944; *post*, § 1438.

[3] Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871; Bush v. Sullivan, 3 G. Greene, 344, 54 Am. Dec. 506; Beatty v. Gregory, 17 Iowa, 114, 85 Am. Dec. 546; Dark v. Johnston, *supra*. See also Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. Rep. 978; Smart v. Jones, 33 L. J. C. P. 154, 15 C. B. (N. S.) 717.

[4] *Post*, § 1419.

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is followed by possession.[1] The authorities to the contrary are generally based upon the theory that the license is an interest in the land, which we will notice later.[2]

§ 1397. Licensee tenant at will — In such cases license revocable and countermandable.— While a license, as we have seen, is a mere personal contract between the licensor and the licensee, yet the line of demarkation between a license and a lease is sometimes faint and shadowy, or, at least, said by the courts to be so, the reason of which is not at all times plain or satisfactory. If we shall at all times bear in mind the essential points of differentiation, there ought to be no considerable difficulty in distinguishing between a license and a lease. And it is safe to say that where the instrument creates an interest and exclusive right of possession in the land and is essentially assignable, unless there is a prohibition to the contrary, it must necessarily be construed as a lease; and it matters not the period of duration of the interest: it is sufficient that one is created. On the other hand, any transaction, whether in writing or by parol, falling short of this, is in general a license merely. It is not to be understood from this, however, that no license can create an interest in the land. On the contrary, where the license is so far executed, and money spent upon it in such a way as that a revocation would work a fraud upon the licensee, there is, to this extent, indeterminate though it be, a *quasi*-interest in the land. Not absolute nor exclusive, it is true, but sufficient merely to protect the licensee.

So, it may be said, as a general rule, that in most cases, except where such a *quasi*-interest in the land is created, or where money is spent or improvements made, under such circumstances as to work an equitable estoppel, the licensee

[1] Anderson v. Simpson, 21 Iowa, 399, 9 M. R. 262.

[2] Bainb. Mines, 219; Wood v. Laye, Sayer, 1; Winter v. Brockwell, 8 East, 308; Drake v. Wells, 11 Allen, 141. But see Desloge v. Pearce, 38 Mo. 588; O'Neill v. New York Co., 3 Nev. 126. See also *ante*, § 1373.

[3] *Post*, §§ 1419, 1420.

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is a mere tenant at will,[1] but may not be summarily ousted;[2] nor can the license ordinarily be revoked except upon notice.[3] But a mere license, unaccompanied by any vested interest in the real estate, created by deed or other writing, and independent of any title acquired by grant, prescription or adverse possession, and claimed for the period of the statute of limitations, must be deemed to be in its own nature essentially countermandable and revocable at the will of the licensor or owner of the fee. It can give no irrevocable right to hold possession of the realty and continue working the mines indefinitely, and against the will of the owner of the land.[4]

Article B.

Of the Assignability of Licenses.

§ 1405. Generally not assignable — Personal privileges.
1406. Not exclusive.
1407. Same — An illustration by Bainbridge — Lord Mountjoy's Case.
1408. Exclusive right may be granted.

§ 1405. Generally not assignable — Personal privileges. A license being more in the nature of a privilege to do certain acts which would otherwise be a trespass, that is to say, being in the nature of a mere profit *a prendre*, the conclusion is easily deducible that, ordinarily, and as a general

[1] Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241; Funk v. Haldeman, 53 Pa. St. 229; Musket v. Hill, 5 Bing. N. C. 694; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Bracken v. Rushville, 27 Ind. 346; Woodward v. Seely, 11 Ill. 157; Beatty v. Gregory, 17 Iowa, 109; Huff v. McCauley, 53 Pa. St. 206; Wheeler v. West, 73 Cal. 126, 11 Pac. Rep. 871; Gillet v. Treganza, 6 Wis. 243; Doe v. Wood, 2 B. & Ald. 724; Upton v. Brazier, 17 Iowa, 153.

[2] Bingo M. Co. v. Felton, 78 Mo. App. 210.

[3] Desloge v. Pearce, 38 Mo. 588, 9 M. R. 247; Bush v. Sullivan, 3 G. Greene (Iowa), 344. Compare Beatty v. Gregory, *supra*.

[4] Pierpont v. Barnard, 2 Seld. 279; Liggins v. Inge, 7 Bing. 682; Wood v. Leadbitter, 13 M. & W. 838; Wolfe v. Frost, 4 Sandf. Ch. 72; Sampson v. Burnside, 13 N. H. 264; Desloge v. Pearce, *supra*.

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rule, whenever the license is essentially personal to the licensee, it is not assignable without the consent of the licensor, and so it may be said that it is only assignable in such cases, and under circumstances where it is also not revocable.[1] In other words, these conditions and departures from the general rule go hand in hand, and one may not be exercised without the other. Thus it is that the authorities agree in saying that a license pure and simple is a mere personal privilege; it extends only to him to whom it is given and cannot be granted over or assigned.[2] It has even been held that, where money was paid for it, it is revocable at law at the pleasure of the licensor;[3] but perhaps the better rule is that this would elevate it to the dignity of a higher estate, as we shall see in the next article. So it has been held that the death of either party will terminate it,[4] and even licenses under seal have been held revocable at the will of the licensor.[5] Likewise, that a conveyance of the land in question by the licensor will, *ipso facto*, terminate it.[6] All of these rules have their limitations and exceptions, which will be fully considered in the next succeeding article.

§ **1406. Not exclusive.**—It would seem to be equally well settled that a license is not exclusive, and, as a general rule, other licenses may be granted with reference to the same subject-matter; but, manifestly, not so as to conflict with property rights.[7] Indeed, this, as we have seen, forms

[1] Harris v. Gillingham, 6 N. H. 11; Hill v. Cutting, 113 Mass. 107; Winter v. Brockwell, 8 East, 308; Liggins v. Inge, 7 Bing. 682; Wallis v. Harrison, 4 M. & W. 538; Jackson v. Babcock, 4 Johns. 418.

[2] Prince v. Case, 10 Conn. 375; Jackson v. Babcock, *supra;* Howes v. Ball, 7 Barn. & Cress. 481.

[3] Hetfield v. Central R. Co., 5 Dutch. 221; s. c., id. 571.

[4] Johnson v. Carter, 16 Mass. 443.

[5] Liggins v. Inge, *supra;* Wood v. Leadbitter, 13 M. & W. 845.

[6] Cook v. Stearns, 11 Mass. 538; Stevens v. Stevens, 11 Met. (Mass.) 251; Wallis v. Harrison, *supra*, 538; East Jersey Iron Co. v. Wright, 33 N. J. Eq. 248.

[7] French v. Brewer, 3 Wall. Jr 346, 19 Fed. Cas. 774; Funk v. Haldeman, 53 Pa. St. 229; Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241; Meyer v. Marshall, 34 W.

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one of the principal distinctions between a license and a lease. As said by the supreme court of Pennsylvania: "That such a right was not exclusive in the grantees, but was to be enjoyed in common with the grantor, his heirs and assigns, has been held in all the cases from that of Lord Mountjoy."[1]

§ 1407. Same — An illustration by Bainbridge — Lord Mountjoy's Case.— The rule is thus stated by Mr. Bainbridge: "It may be stated as a general rule, that a license to work mines is not exclusive of the similar rights of the grantor, or those who may claim under him by virtue of a similar authority. This was decided in a very early case. Lord Mountjoy, being seized in fee of the Manor of Canford, sold it in fee with the reservation and with a covenant on the part of the purchaser that Lord Mountjoy, his heirs and assigns, might dig for ore in the lands (which were great wastes) parcel of the manor, or dig turf also for the making of alum. It was held that, notwithstanding this grant, the purchaser, his heirs and assigns, might dig also, like the case of common, *sans nombre*. . . . It appears, therefore, that the exclusive right to minerals will not necessarily be conferred by the grant of a license to work them. But it must be concluded from these decisions that the license to work may not be in such a form as to effectually vest in the grantee an undisturbable right to the minerals."[2]

§ 1408. Exclusive right may be granted.— But it must not be understood by the foregoing, nor by anything said in any of the cases, that an exclusive right may not be

Va. 42, 11 S. E. Rep. 730, 732. See also § 1391.

[1] Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241, citing (*q. v.*) Lord Mountjoy's Case, 1 Godb. 17–24; Grubb v. Guilford, 4 Watts, 224; Grubb v. Bayard, 2 Wall. Jr. 100; Chetham v. Williamson, 4 East, 469–476.

[2] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 269, citing Lord Mountjoy's Case, Godb. 17, 18, 4 Leon. 140, Co. Litt. 165*a*; Chetham v. Williamson, 4 East, 469.

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granted. While it has been held that full and free liberty to work is sufficient to grant an exclusive right, yet the intention of the parties must govern; and even those words would not be sufficient if it conflicted with the rights of others. And if exclusive rights were given to two persons referring to the same property, of course there would be a conflict; but where the words employed show a clear intention to confer an exclusive right upon the licensee, he will generally secure it, and the first in time will be stronger in right.[1]

Article C.

Of the Revocability of Mining Licenses.

§ 1415. Same principles apply to mining as to other licenses.
1416. License held revocable — License of government.
1417. Same — License to dump tailings revocable.
1418. Contrary doctrine.
1419. Whence the diversity of opinion.
1420. Same — Irrevocable license — Lease — Further examination of the authorities.
1421. Summary.

§ 1415. Same principles apply to mining as to other licenses.— There is a great diversity of opinion among the adjudged cases as to whether a license is always revocable at the will of the licensor. We will not attempt a complete discussion of this question, since the law of licenses is substantially the same when applied to mining as to ordinary real estate. There are several cases, however, wherein this question has been considered with special reference to mining licenses, which ought to be noticed. These, while not so numerous as those relating to other questions — the

[1] Bainb. Mines, pp. 270, 271; Doe v. Wood, 2 Barn. & Ald. 724: Chicago & Alton Oil & M. Co. v. United States Petroleum Co., 57 Pa. St. 83; Gloninger v. Franklin Coal Co., 55 Pa. St. 9; Grove v. Hedges, id. 504: Caldwell v. Fulton, 31 Pa. St. 435; Upton v. Brazier, 17 Iowa, 153; List v. Cotts, 4 W. Va. 543; Norway v. Rowe, 19 Ves. 156: Roberts v. Davey, 4 Barn. & Ald. 672.

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right to lay water-courses over the lands of another, for instance — are equally as variant, so that anything like a reconciliation of them is impossible.

§ 1416. License held revocable — License of government.— The right of the licensor to revoke a mining license has been expressly recognized by several authorities.[1] The reasoning of these cases seems to be based upon a correct understanding of the term "license," namely, that it is only a permission to enter upon the lands of another for certain purposes — the mining and removal of certain minerals. Therefore, these acts will be permitted to continue only during the pleasure of the person granting the privilege. This, of course, where there is no contract fixing the duration of the license. The courts have generally shown a desire to place the parties *in statu quo*, if possible, before permitting a revocation. This should always be done. Thus, in the Iowa case,[2] where it appeared that the miner had been induced, under a parol license, to sink a shaft and run drifts, but before he had an opportunity to prove the ground the license was revoked, the court held that he was entitled to the six months' notice to quit, recognized by the common law, unless the moneys expended by him were refunded. And this is substantially the holding of the Missouri court,[3] where six months' notice to quit was held to terminate the right. The California court, on the other hand, held the license to be revocable at pleasure.[4] And the license of the government upon its lands is revoked when the title passes to another party.[5]

§ 1417. Same — License to dump tailings revocable.— In a recent case in Oregon the court held that a parol

[1] Desloge v. Pearce, 88 Mo. 588, 9 M. R. 247; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Bush v. Sullivan, 3 G. Greene, 344, 54 Am. Dec. 506; Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871.

[2] Bush v. Sullivan, *supra;* followed in Beatty v. Gregory, 17 Iowa, 114, 85 Am. Dec. 546, 9 M. R. 234; Harkness v. Burton, 39 Iowa, 101.

[3] Desloge v. Pearce, *supra.*

[4] Wheeler v. West, *supra.*

[5] Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925, 5 L. R. A. 236.

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license to dump tailings and debris upon the lower placer claim of another is revocable, and further continuance of the acts was enjoined.[1] The court distinguishes this from its former decision that a parol license under which expenditure has been incurred is irrevocable, upon the ground that it does not appear that anything was paid plaintiff for it, or that his land would in any manner be benefited thereby. But, according to the authorities which we will presently notice,[2] this has never been the true test; it is whether the licensee has been put to expense by representations of the licensor, to such an extent that he cannot be placed *in statu quo*. And this is not different from the previous position of the Oregon court; for the building of a dam upon another's land, for instance,[3] cannot be any improvement to the land of the licensor. We think the last decision[4] is correct, for the reason that the privilege claimed amounted to nothing more than the right to deposit tailings upon another's land so long as it pleased that person to permit it, and because there was no attempt to convey any interest in the land itself; if it had it would probably have been void under the statute of frauds because not in writing. It is difficult, however, to see wherein the facts differ materially, except in the decision of them, from the previous decisions of that court.[5]

§ 1418. Contrary doctrine.— Other authorities are just as emphatic to the effect that a license, if coupled with an interest,[6] or where an incorporeal hereditament is granted,[7] if the licensee has made expenditures upon the faith of it,[8] becomes irrevocable. But an examination of these cases satisfies us, and in the next section we will attempt to satisfy

[1] Miser v. O'Shea, 37 Oreg. 231, 62 Pac. Rep. 491.

[2] *Post.* §§ 1418, 1419.

[3] Hallock v. Suitor, 37 Oreg. 9, 60 Pac. Rep. 384.

[4] Miser v. O'Shea, *supra*.

[5] See cases cited in 62 Pac. Rep. 493.

[6] Funk v. Haldeman, 53 Pa. St. 229.

[7] Bainb. Mines, p. 268.

[8] Darke v. Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

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the reader, that the license, so called, under consideration, if it ever had been one in fact, had ceased to be such, having been elevated to the dignity of an estate in the land.

§ 1419. Whence the diversity of opinion.— As we have noticed in a preceding section,[1] there is a clear distinction between a license and a lease or an easement. The latter is defined by an eminent law writer as "a permanent interest in another's land, with the right at all times to enter and enjoy it."[2] If these definitions are borne in mind in considering the cases on both sides of the question of revocability of licenses, much of the apparent difficulty will vanish. From the very nature of a license it would seem to be revocable. For if it is only a privilege of doing a certain act or series of acts upon the lands of another, it must follow that the owner of the land has the right to order the discontinuance of these acts at pleasure, in the absence of a fixed term, and at the expiration of the term at all events. This being true, it must follow that a license cannot be so worded as to be "coupled with an interest in the land," as stated by some of the authorities. Because the minute it ripens into an interest in the land, it ceases to be a license and rises to the dignity of an easement or a lease, as the case may be. Perhaps the line of this distinction is rather shadowy at times, but it is always discernible if the true spirit and intent of the law is kept in mind. And this distinction furnishes a reason why an easement must be created by writing, unless it is acquired by prescription, while a license may be created either by writing or parol.[3] An able and exhaustive examination of all the authorities upon the question of the revocability of licenses to create a burden upon land, followed by expense in pursuance thereof, is found in a recent volume of the Lawyers' Reports Annotated.[4]

[1] *Ante*, § 1394.
[2] 3 Kent Com., p. 452.
[3] *Ante*, § 1395.
[4] See note to Pifer v. Brown, 45 W. Va. 412, 49 L. R. A. 497.

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§ 1420. Same — Irrevocable license — Lease — Further examination of the authorities.— In the leading Pennsylvania case[1] the contract in question provided that, in consideration of one hundred dollars already paid by the second party, he was given the exclusive privilege to sink wells and oil pits upon the lands in question for the term of ten years; he to pay a further compensation, in case operations were begun, of ten dollars per year for each well from which he continuously pumped oil. The court held this to be an irrevocable license. Of course it was irrevocable within the term for which it was granted; but if "a conveyance of a specified portion of a mine, for a fixed period of years, in consideration of rent or other recompense,"[2] constitutes a lease, it would seem to us that this is what the contract in this case should be called. And in the federal case,[3] the instrument conveyed to the grantee the absolute privilege, "from time to time and all time hereafter, to dig, take and carry away all iron ore found within the bounds" of the land. The court called this an irrevocable license; but if it is possible to sever an estate by deed, granting the minerals and reserving the surface, it would seem that this is what was done in that case.

It seems to us that in both of these cases the right granted amounted to an interest or estate in the land, and that therefore it was not a license, but something greater, more nearly a lease. With the result reached we have no criticism, but merely with the name given the instrument under consideration. But the Pennsylvania court has a reckless habit of bestowing names upon instruments and contracts, which if it were important might lead to serious difficulty. However, since "a rose would be as sweet by any name," perhaps no quarrel ought to be made with the court if it calls an instrument the same in form, a license one day, a

[1] Darke v. Johnston, 55 Pa. St. 164.

[2] *Ante*, § 1143.

[3] Grubb v. Bayard, 2 Wall. Jr. 81, 11 Fed. Cas. 89.

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lease the next, and a sale of the coal or mineral in place on the third. It is the rights which the contract confers, after all, that is important.

§ 1421. Summary.—From the foregoing we conclude: That a mining license is not materially different from other licenses: it is the privilege to go upon the lands of another and mine and extract the product; that it is not ordinarily exclusive, it being within the power of the licensor to grant a like privilege to others; that it will always be restricted to the purpose for which it was created; that it differs from a lease or easement in that it does not convey any estate in the land itself; that it may be created either by writing or orally, and is not void under the statute of frauds; that it is sometimes, but not always, assignable, depending upon the nature and objects of its creation; that there is a great contrariety of opinion as to whether it is revocable, the prevailing opinion being apparently to the effect that it is; and that whenever it purports to convey any interest in the land itself, it is elevated to the dignity of an estate in the land itself, and is no longer a license.

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PART XIV.

GENERAL RIGHTS AND DUTIES OF MINING OPERATORS INTER SESE.

CHAPTER I.

OF TENANCY IN COMMON.

ARTICLE A.

Rights and Duties of Co-tenants as Between Themselves.

§ 1430. Tenancy in common — In general — Definition.
1431. Possession of one co-tenant not adverse to others.
1432. Same — Statute of limitations.
1433. Different from mining partnership.
1434. Rights and duties of co-tenants as between themselves.
1435. Right to work property.
1436. Right to work — Majority and minority.
1437. Ordinary work not waste — The old rule to the contrary.
1438. Not waste for co-tenant to mine.
1439. Same — Mr. Bainbridge's view.
1440. Same — Co-tenant's right of occupation.
1441. When not co-tenants — One tenant binding all.
1442. No exclusive possession or right — Unreasonable interference.
1443. When possession of one co-tenant not possession of all.
1444. Non-assenting co-tenant's right to account.
1445. Measure of the account — What included.
1446. Same — When rent the proper basis.
1447. Same — Rents and profits.
1448. Matters for consideration in allowing rent to excluded co-tenant.
1449. Surplus over co-tenant's share.
1450. Another measure — Value of coal at pit's mouth.
1451. Ore in place as measure of damages and account.
1452. Lien for expenditures — Equitable right to profits.
1453. What may be offset — Repairs, taxes, etc.
1454. Whether agreement necessary.
1455. What acts of individual co-tenant inure to benefit of all.

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§ 1456. Purchases by and from co-tenants.
1457. Same — Interest of one purchased by another does not inure to benefit of third.
1458. Further as to rights and duties of co-tenants — Action for damages.
1459. Fixtures and improvements — Ownership of.
1460. Injunctions by and against co-tenants.
1461. Injunction in proper cases.
1462. Equity — Pennsylvania doctrine — Other remedies.
1463. When lessor liable for trespass.

§ 1430. Tenancy in common—In general—Definition.— A tenancy in common for the working of mines may be created in various ways. It exists when two or more persons locate, buy, or otherwise own or use mining property, whether personal or real, as owners, for the time being or in fee.[1] It is scarcely the purpose of this work to deal extensively with the subject of tenancy in common. The present writing is therefore limited to special features in-

[1] Clegg v. Clegg, 31 L. J. Ch. 153, 14 M. R. 289; Durham, etc. Ry. Co. v. Wawn, 3 Beav. 119; Simpson v. Tellwright, 2 Lutw. 1247; Denys v. Shuckburg, 4 Y. & C. 42; Huntley v. Russel, 13 Q. B. 572; Tupper v. Annand, 16 Can. Sup. Ct. 718; 420 Min. Co. v. Bullion M. Co., 3 Sawy. 634, 9 Fed. Cas. 592, No. 4,989; Union Cons. M. Co. v. Taylor, 100 U. S. 37; Bissell v. Foss, 114 U. S. 252, affirming S. C., First Nat. Bank v. Bissell, 2 McCrary, 73, 4 Fed. Rep. 694; Williams v. Morrison, 28 Fed. Rep. 872; Kahn v. Central S. Co., 102 U. S. 641; McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863; Hihn v. Peck, 18 Cal. 640; Goller v. Fett, 30 Cal. 482; Barnum v. Landon, 25 Conn. 137; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Huff v. McDonald, 22 Ga. 131; Murray v. Haverty, 70 Ill. 318; Dodge v. Davis, 85 Iowa, 77; Adam v. Briggs Iron Co., 7 Cush. 361; Duncan v. Sylvester, 24 Me. 482; Anaconda Copper M. Co. v. Butte & B. M. Co., 17 Mont. 519; Capner v. Flemington, 3 N. J. Eq. 467; Vervalen v. Older, 8 N. J. Eq. 98; Reed v. Reed, 16 N. J. Eq. 248; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Van Valkenburg v. Huff, 1 Nev. 142; Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. Rep. 151; Coleman's Appeal and Grubb's Appeal, 62 Pa. St. 252; Irwin v. Covode, 24 Pa. St. 162; Frisby's Appeal, 88 Pa. St. 144; Brunson v. Lane, 91 Pa. St. 153; Sayers v. Hoskinson, 110 Pa. St. 473; Angier v. Agnew, 98 Pa. St. 587; North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. 488; Blewett v. Coleman, 40 Pa. St. 45; Coleman v. Grubb, 23 Pa. St. 393; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Graham v. Pierce, 19 Gratt. 28.

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separable from mining law generally. What we have to do with here is that species of co-tenancy which exists when two or more co-owners own or operate mining property.[1]

§ 1431. Possession of one co-tenant not adverse to others.— In mining, as in all other kinds of real property, the possession of one co-tenant is the possession of all. Therefore one co-tenant cannot hold adversely to the others, except after ouster.[2] As to what constitutes an ouster by one co-tenant against another, it may be stated that mining claims are subject to the same rules as other real property, namely, that the acts claimed to constitute it must be more open, notorious and hostile than would be required in the case of a stranger claiming to hold adversely. There must be outward acts of exclusive ownership, unequivocal and notorious, of such a character that they are calculated in their very nature to give notice to the ousted co-tenant;[3] such, for instance, as the holding of exclusive possession, openly and notoriously, after demand by the ousted co-tenant, sufficient to sustain an independent action in ejectment.[4] There must be a denial *in toto* by the adverse holder of the further existence of the co-tenancy, followed by acts calculated to exclude the co-tenants from all participation as such.[5] But when this occurs, as we shall presently see,[6] the ouster is accomplished, and the ousted co-tenant may assert his rights by ejectment. This rule was recognized by the supreme court of the United States in the case just cited,[7] to the extent of holding the ousted co-tenant, against whom the statute had not run, entitled to his interest, notwith-

[1] See authorities in note 1, *ante*, p. 1091; Freeman, Co-tenancy, § 3; Bainb. Mines (1st Am. from 3d Lon. ed.), pp. 53, 332, 333, 402; Van Valkenburg v. Huff, *infra;* Moore v. Hammerstag, 109 Cal. 122; Adams v. Briggs Iron Co., 7 Cush. 361; Hughes v. Devlin, 23 Cal. 501; Morganstern v. Thrift, 66 Cal. 577, 6 Pac. Rep. 689.

[2] Union Cons. S. M. Co. v. Taylor, 100 U. S. 37, following Van Valkenburg v. Huff, 1 Nev. 142.

[3] Freem. Co-ten., §§ 221, 301.

[4] Day v. Davis, 64 Miss. 253.

[5] Coleman v. Clements, 23 Cal. 245.

[6] *Post*, § 1443.

[7] Union Cons. S. M. Co. v. Taylor, *supra*.

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standing his failure for several years to contribute his portion of the assessment work. The reason for the latter part of this decision is apparent, since the failure to contribute is a matter for which a special remedy is provided by statute,[1] and can be taken advantage of only in that way, and, if that remedy is not invoked, the right to it, or any other, is waived.

§ 1432. **Same — Statute of limitations.** — This being true, of course the statute of limitations does not begin to run in favor of one co-tenant attempting to claim adversely to another until actual ouster.[2] Therefore the burden is on the person seeking to assert such adverse title to show an ouster of his co-tenant, followed by open, adverse and exclusive possession for a period equal to the statute of the state.[3] It is also the rule in some jurisdictions that where the co-tenant claiming an ouster is a foreign corporation, it is not entitled to claim the benefits of the statute of limitations, which will not run in its favor.[4]

§ 1433. **Different from mining partnership.** — While many of the features of co-tenancy in mining claims are similar, in their application, to mining partnership, when the subjects are carefully analyzed, the distinction between the two is apparent. Mining partnership, as we will notice later,[5] exists when two or more owners of a mining claim, for the purpose of operating it, actually engage in working thereon. This requirement of uniting for working the claim does not exist in the case of a co-tenancy. It is sufficient that they are joint owners in the claim.[6] Nor is it neces-

[1] R. S. U. S., § 2324. See also *ante*, § 520 *et seq.*

[2] Union Cons. S. M. Co. v. Taylor, 100 U. S. 37.

[3] Freem. Co-ten., § 222 *et seq.*

[4] Union Cons. S. M. Co. v. Taylor, *supra*, following the Nevada supreme court in Robinson v. Imperial S. M. Co., 5 Nev. 44; Barstow v. Union Cons. S. M. Co., 10 Nev. 386.

[5] *Post*, § 1500 *et seq.*, especially §§ 1504, 1505.

[6] Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. Rep. 151. See also Cline v. James, 101 Fed. Rep. 737.

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sary, under some of the authorities,[1] that they are joint owners in the mine, if they have such a community of interest in the working of it as to make them joint owners in the product. Thus, in a Nevada case,[2] the owners of a mine, who also owned a mill in connection, leased the mine and contracted with the lessee to treat the ore in their mill for a share of the net proceeds, and the court held them all tenants in common of the ore; and because the owners of the mine were not engaged in working it, having leased it to others, they were held tenants in common of the property and not mining partners, which we think is undoubtedly correct.

The Idaho supreme court recently had under consideration a case where the facts showed that plaintiff owned an undivided seven-eighths of the property and the defendant the remaining eighth; that defendant was engaged in working off a large portion of the property, to the exclusion of plaintiff and without his consent; that defendant had acknowledged itself liable for an accounting and had offered to permit plaintiff to come upon the premises and witness the clean-up, but had forbidden him from in any manner participating in it. The court held these parties to be mining partners,[3] and cited as authority the Idaho statute,[4] which says that "a mining partnership exists when two or more persons, who own . . . a mining claim, . . . actually engage in working the same." Any extended criticism could serve no useful purpose; hence we content ourselves with the statement that we are unable to see in what respect these parties were engaged in working the mine. We think they were, unquestionably, tenants in common, in which case plaintiff had his action for an accounting, or for damages for withholding possession.[5] But to say they

[1] Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. Rep. 151; Hudepohl v. Liberty Hill Con. M. & W. Co., 80 Cal. 553, 22 Pac. Rep. 339, 340 and cases.

[2] Vietti v. Nesbitt, *supra*.

[3] Hawkins v. Spokane Hydraulic M. Co., 2 Idaho, 970, 28 Pac. Rep. 433.

[4] R. S. Idaho. § 3300.

[5] Paul v. Cragnas (Nev.), 59 Pac. Rep. 857, 47 L. R. A. 540.

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were partners, not only advertised an ignorance of the meaning of their own state statute, but of the plainest principles governing mining partnership as well.

§ 1434. Rights and duties of co-tenants as between themselves.— Whatever the law has been in the past, it is now well settled that any co-tenant has the right of possession and use of the common property;[1] and while mining property is generally so situated and worked as that each co-tenant or co-owner cannot work separate from the others to advantage, yet, if they can do so, they have a perfect right to operate in that manner,[2] subject to the same accountability between each other.[3]

§ 1435. Right to work property.— It seems well settled, from the very earliest cases[4] down to the present time,[5] that one co-tenant of a mine has a perfect right to enter upon any part of it and mine and remove the product. The English case[6] holds that he is limited to his share, but this rule should not prevail because of its impracticability. For any person, or any court, to assume to look at a mine and say

[1] McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863; Pico v. Columbet, 12 Cal. 414; Ord v. Chester, 18 Cal. 77; Coleman v. Clement, 23 Cal. 245; Morganstern v. Thrift, 66 Cal. 577, 6 Pac. Rep. 689; Findley v. Smith, 6 Mumf. 134; Conrad v. Saginaw, 54 Mich. 249; Ward v. Carp River Co., 47 Mich. 65; Anaconda Copper M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. Rep. 924; Vervalen v. Older, 8 N. J. Eq. 98; Gaines v. Green Pond M. Co., 33 N. J. Eq. 603; Elwell v. Burnside, 44 Barb. 447; Neel v. Neel, 19 Pa. St. 328; Irwin v. Covode, 24 Pa. St. 162; Angier v. Agnew, 98 Pa. St. 587; Early v. Friend, 16 Gratt. 21; Graham v. Pearce, 19 Gratt. 28; Job v. Potton, L. R. 20 Eq. 84; Clegg v. Clegg, 31 L. J. Ch. 153; Simpson v. Tellwright, 2 Lutw. 1247. See also Bainb. Mines (1st Am. from 3d Lon. ed.), pp. 53, 54; McSwinney, Mines, 110; Rogers, Mines (2d ed.), p. 267.

[2] Bainb. Mines, 54; Early v. Friend, *supra;* Simpson v. Tellwright, *supra;* Ord v. Chester, 18 Cal. 77; Blewett v. Coleman, 40 Pa. St. 45.

[3] Graham v. Pearce, *supra.*

[4] Job v. Potton, L. R. 20 Eq. 84, 14 M. R. 329.

[5] People ex rel. Breene v. District Ct. of Lake County (Colo.), 62 Pac. Rep. 206.

[6] Job v. Potton, *supra.*

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when a co-tenant has mined his portion, if not impossible, would be very difficult. The better doctrine would seem to be that he may work the mine, even to exhaustion, being liable to his co-tenants for their portion of the proceeds.[1] But of course he may not work it to the exclusion of his co-tenants.[2] Nor will one be permitted to work other property through the works of the co-tenancy without the permission of the other co-tenants.[3] Neither has the right to interfere with or impede the working of the other.

§ 1436. Right to work — Majority and minority. — It is sometimes thought that a majority in interest controls the working of a mine. The supreme court of California, out of the exigencies of the particular case, evolved the doctrine that a majority of the interest, and not of numbers, controlled the working of the claim, but cited as authority a mining partnership case.[4] While this is generally true as to mining partners, it is not as to tenants in common.[5] It should not, therefore, have been applied in the Idaho case.[6] Any tenant in possession may lawfully work the mine.[7]

§ 1437. Ordinary work not waste — The old rule to the contrary. — The old rule prevailing in England in former times is thus stated by Mr. Bainbridge: "Coparceners, joint tenants, and tenants in common are also liable to each other for waste; and actions of account are maintainable for the receipt of more than the proper share of profits. All such owners may also be restrained by injunction from wilful destruction of the common property. But they may

[1] Simpson v. Tellwright, 2 Lutw. 1247; North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. 488; Vervalen v. Older, 8 N. J. Eq. 98; Russell v. Merchants' Bank, 47 Minn. 286; McCord v. Oakland Q. M. M. Co., 64 Cal. 134, 27 Pac. Rep. 963; Anaconda Copper M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. Rep. 924.

[2] People ex rel. Breene v. District Court (Colo.), 62 Pac. Rep. 206.

[3] Id.

[4] Dougherty v. Crary, 30 Cal. 291.

[5] Duryea v. Burt, 28 Cal. 569.

[6] Hawkins v. Spokane H. M. Co., 2 Idaho, 970, 28 Pac. Rep. 433; s. c., 33 Pac. Rep. 40.

[7] *Ante*, § 1435.

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all concur among themselves in an act of waste. The concurrence must include all. In one case five of the owners had authorized the construction of a railroad upon the land held in common, against the wishes of the remaining owner, who proceeded to remove the rails, and the court of chancery refused to restrain him."[1] Pursuing the same principle, it has always been held that the license of one co-tenant was insufficient to protect a purchaser of ore taken from a mine.[2]

§ 1438. Not waste for co-tenant to mine.— Mining by a co-tenant in the usual manner should never be considered waste. His entry upon the common property, for the purpose of mining, is always lawful, as we have seen,[3] and, therefore, so long as he prosecutes his operations in a miner-like manner he is not impeachable for waste.[4] The reason for this is plain. The working of mining property by a person not entitled to the possession, no matter how carefully done, is of necessity waste for which he is liable; for, of course, it is impossible for a trespasser to acquire any rights by virtue of his possession, even though obtained peaceably. But it must be apparent that the same rule does not apply to one or more tenants in common. The very nature of mining property, especially in the western states and territories, requires that it be worked. In the latter, until patent issues, a failure to do so makes it liable to forfeiture. To say that, when one co-tenant complies with this requirement and saves the claim from forfeiture, he becomes liable to the others for waste, would be to announce a rule which we think should not be followed by any court. This question is ably reasoned by the supreme court of California[5] in an

[1] Bainb. Mines (1st Am. from 3d Lon. ed.), 53, citing Co. Litt. 57*b* and 270*b*; Bacon, Abr., Waste, G.; 4 & 5 Anne, ch. 16, sec. 27; Denys v. Shuckburg, 4 Y. & C. 42; Durham & S. Ry. Co. v. Wawn, 3 Beav. 119.

[2] Omaha & G. S. M. Co. v. Tabor 18 Colo. 41, 21 Pac. Rep. 925. See Job v. Potton, L. R. 20 Eq. 84.

[3] *Ante*, § 1435.

[4] McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863.

[5] McCord v. Oakland Q. M. Co., *supra*, citing Cal. Code C. P., § 732;

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opinion substantially in accordance with the views here expressed. But the supreme court of West Virginia, in a recent case, announces a somewhat different doctrine, holding that the removal of gas from the premises by a tenant owning three-tenths of the co-tenancy, by means of a well bored by him, is waste.[1] A close examination of this case, however, including the manner in which the rights of the parties were adjusted, shows no material conflict with our position. Of course the working co-tenant must account to his fellows for the net proceeds from ores mined and marketed, and we think he should be held liable for careless or negligent mining; not for mere errors of judgment, but for a violation of the ordinary rules of good mining. Beyond this his liability should cease. The question of the measure of damages for such work will be discussed later.[2]

§ 1439. Same — Mr. Bainbridge's view.— "Such are the rights of limited or qualified owners, when the mines are unsevered from the right to the surface; but when they form a separate inheritance, it is obvious that the ordinary rules respecting waste have no application; for it would be manifestly absurd to suppose that express grants or limitations of mines in that condition were not intended to be at all times fully enforced and enjoyed. In all these cases, therefore, such owners will have the right to work the mines, whether opened or unopened, new or old, according to the duration of their interest, if not otherwise prevented. . . . For there can be no action of trespass in such cases, on account of the unity of possession. The remedy of account is, however, open to those who do not co-operate."[3]

Elwell v. Burnside, 44 Barb. 447; Neel v. Neel, 19 Pa. St. 328; Pico v. Columbet, 12 Cal. 414; Finley v. Smith, 6 Mumf. 134; Wat. Tres., 947; Irwin v. Covode, 24 Pa. St. 162.

[1] Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694.

[2] *Post*, §§ 1444–77.

[3] Bainb. Mines, pp. 53, 54. See also Heil v. Strong, 44 Pa. St. 264; Kier v. Peterson, 41 Pa. St. 361; North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. 488.

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§ 1440. Same — Co-tenant's right of occupation. — That each co-tenant has an equal right to the possession of every part of the co-tenancy is indisputable. This right is one of the essential elements of a co-tenancy.[1] That possession of mining property would almost invariably be useless without the further right to extract the minerals must be equally obvious. Therefore, unless a co-tenant is entitled to work the mine subject to the terms previously suggested,[2] it would be entirely within the power of one co-tenant, owning ever so small an interest, to effectually block operations for an indefinite period, and, in a case like the one in West Virginia,[3] for instance, until the oil, which would otherwise enrich the parties, is lost to them forever, by being drained through wells on adjoining premises. The California court recognizes this rule in very emphatic language.[4] But the West Virginia court[5] places co-tenants and life tenants in the same class, and holds the opening of new mines by either to be waste. In this case the other co-tenants were only remaindermen, who were not entitled to possession until the death of the life tenant, to whose interest Jones had succeeded. But this circumstance could make no difference, since they would be entitled to an accounting, notwithstanding this fact. We are unable to agree with this part of the decision, though we do think the ultimate adjustment of the rights of the parties was just and equitable. It is a case where a wrong reason was given for a righteous decision.

§ 1441. When not co-tenants — One tenant binding all. Enough has appeared in the branch of this work relating to severance to demonstrate that the owners of two severed

[1] Freem. Co-ten., § 67.

[2] *Ante*, § 1438.

[3] Williamson v. Jones, 42 W. Va. 562, 38 L. R. A. 694. See also s. c., 39 W. Va. 231, 25 L. R. A. 222.

[4] McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 867, quoting from Irwin v. Covode, 24 Pa. St. 162. See also Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Edsall v. Merrill, 37 N. J. Eq. 114; Capner v. Fleming, 3 N. J. Eq. 467; Smith v. Sharp (N. C.), Busb. 91; Morganstern v. Thrift, 66 Cal. 577, 6 Pac. Rep. 689.

[5] Williamson v. Jones, *supra*.

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estates are not co-tenants, even though their estate is contained within the same wedge of earth.[1] There is a single case announcing a rule or doctrine contrary to the text, but it seems not to have been followed.[2] It has been held that one co-tenant may bind all;[3] but while this may sometimes be true, the general rule must be to the contrary. For if one co-tenant may not himself work the mine without being liable for waste, as some courts hold,[4] and for damages for withholding possession,[5] it must follow that he cannot permit a stranger to do acts concerning it which will bind his co-tenants without their consent.[6]

§ 1442. No exclusive possession or right — Unreasonable interference.— Enough has appeared in the foregoing to demonstrate that no co-tenant may lawfully exclude a co-tenant from the possession and use of the common property.[7] It would seem, however, that this would not give the non-assenting co-tenant the right of unreasonable interference. If he cannot consent to the acts of his co-tenant and feels injured by such acts, he may resort to the courts for protection,[8] but he has not the right to forcibly obstruct or prevent reasonable operations, including use, production and consumption in the ordinary course of mining.[9]

[1] Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. Rep. 1020. See Bronson v. Lane, 91 Pa. St. 153; Marvin v. Brewster Iron Co., 55 N. Y. 538; Erickson v. Michigan Co., 50 Mich. 604; Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880.

[2] Murray v. Haverty, 70 Ill. 318.

[3] Crary v. Campbell, 24 Cal. 634.

[4] *Ante*, § 1438, note 6, *infra*.

[5] *Ante*, § 1438.

[6] See Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925, 5 L. R. A. 236; Williamson v. Jones, 43 W. Va. 562. See also Hawkins v. Spokane H. M. Co., 2 Idaho, 970, 28 Pac. Rep. 433, 33 Pac. Rep. 40.

[7] Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Graham v. Pierce, 19 Gratt. 28; Izard v. Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595; Coleman v. Grubb, 23 Pa. St. 393.

[8] Bainb. Mines (1st Am. from 3d Lon. ed.), 54; Lindl. Mines, sec. 790; Roberts v. Eberhardt, Kay, 148.

[9] Freem. Co-ten. (2d ed.), § 249*a*; Job v. Potton, L. R. 20 Eq. 84, 14 M. R. 329. Compare Murray v. Haverty, 20 Ill. 320, decided under special statute.

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§ 1443. When possession of one co-tenant not possession of all.— While, as we have seen,[1] the possession of one co-tenant is ordinarily the possession of all, so far as it relates to adverse occupancy, this does not continue after actual ouster. When there is an ouster the relationship of co-tenants ceases, and thenceforth the parties deal with each other at arm's length.[2] And where the party in possession does not enter as a tenant in common with the other, but as the owner of the entire claim, claiming it under a separate conveyance, in hostility to the other, no co-tenancy exists and the statute will run from such entry.[3]

§ 1444. Non-assenting co-tenant's right to account.— By the early common law there was no accounting between tenants in common.[4] In this case Moncure, J., uses these words: "At common law joint tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, since he could not be charged as bailiff or receiver to his companion unless he actually made him so."[5] This was changed by the statute of Anne.[6] Following that statute the law has become firmly rooted that the operating tenant must account to the non-assenting co-tenant;[7] this both as to profits and waste, where the latter is committed, for both of which he is liable.[8]

[1] *Ante*, §§ 1431-32; Coleman v. Clements, 23 Cal. 245; Partridge v. McKinney, 10 Cal. 181; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Van Valkenburg v. Huff, 1 Nev. 142; Southmayd v. Southmayd, 4 Mont. 100.

[2] 420 M. Co. v. Bullion M. Co., 3 Sawy. 634, 9 Fed. Cas. 592, 602. See also cases, in note 1, *supra;* Partridge v. McKinney, *supra;* Susquehannah, etc. Co. v. Quick, 61 Pa. St. 228; Van Valkenburg v. Huff, *supra;* Mallett v. Uncle Sam M. Co., *supra.*

[3] Abernathie v. Cons. Virginia M. Co., 16 Nev. 260; Telloch v. Worrall, 49 Pa. St. 133.

[4] Early v. Friend, 16 Grat. 21.

[5] Citing 1 Tho. Co. 788.

[6] 4 Anne, ch. 16, § 27; Early v. Friend, *supra.* See Henderson v. Mason, 17 Q. B. 701; McMahon v. Burchell, 3 Hare, 97.

[7] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 53, 54, 56; Denys v.

[8] Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694. See also note 7, *supra.* And in some states, West Virginia especially, this is regulated by statute. Laws 1891, ch. 92, § 2.

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§ 1445. Measure of the account — What included.— The measure of this account, however, is a matter upon which the courts are not agreed. What seems to be the greater weight of reason and authority favors the rule that the measure of the accounting to a non-assenting co-tenant who refuses to take the risk of possible loss is fair rental value.[1] Of course, rent would be payable under this rule whether the operations of the working co-tenant are successful or not. On the other hand, some courts of equal character and strength hold that the true measure of the account and liability of the operating co-tenant is the proportionate share of the net proceeds after deducting actual operating expenses fairly and honestly incurred.[2] This rule opens a broad field as to what are and what are not proper expenditures.

§ 1446. Same—When rent the proper basis.—Of course the same rule which generally applies to ordinary real estate, the earning capacity of which, by way of rental, is readily ascertainable, could not always be invoked in measuring compensation for the use of mining property. In the latter case the earning capacity must necessarily depend upon the number of openings and the amount of mineral extracted. Therefore any fixed rental would not, in such

Shuckburg, 4 Y. & C. 42; Job v. Potton, L. R. 20 Eq. 84; Bradburne v. Botfield, 14 M. & W. 559; Kahn v. Central S. Co., 102 U. S. 641; McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863; Holbrooke v. Harrington (Cal., 1894), 36 Pac. Rep. 365; Abel v. Love, 17 Cal. 233; Neuman v. Dreifurst, 9 Colo. 228, 11 Pac. Rep. 98; Barnum v. Landon, 25 Conn. 137; Huff v. McDonald, 22 Ga. 131; Stenger v. Edwards, 70 Ill. 631; Adam v. Briggs Iron Co., 7 Cush. 361; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Edsall v. Merrill, 37 N. J. Eq. 114; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Frisbee v. Irvin, 88 Pa. St. 144; Bronson v. Lane, 91 Pa. St. 153; Coleman's Appeal and Grubb's Appeal, 62 Pa. St. 252; Allen v. Barkley, 1 Speers' Eq. 264, 14 M. R. 246; Early v. Friend, *infra;* Graham v. Pierce, 19 Grat. 28.

[1] Early v. Friend, 16 Grat. 21, 78 Am. Dec. 649; Edsall v. Merrill, 37 N. J. Eq. 114; Allen v. Barkley, 1 Speers' Eq. (S. C.) 264.

[2] Ruffner v. Lewis' Ex'rs. 7 Leigh, 720; Graham v. Pearce, 19 Grat. 28. And see McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 862. See also Pickering v. Pickering, 63 N. H. 468.

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cases, be an accurate mode of measuring compensation. Cases might occur, however, where the rights of the parties could be equitably adjusted in this manner. For instance, in an early Virginia case, where the property consisted of a salt well which had been worked by one of the co-tenants, the court fixed compensation for this upon a basis of yearly rental.[1] It appears, however, that there was an arrangement for rent between some of the co-tenants and the one working the well, which seems to have furnished the chief reason for the court's decision. It seems to us that an adjustment upon the basis of royalty on the value of the product mined would usually be more satisfactory.[2]

§ 1447. Same — Rents and profits.— Another mode of accounting, which has become quite general in several jurisdictions, is upon the basis of rents, issues and profits considered as in other actions; the operating tenant being charged with all receipts for minerals extracted, and credited with all expenses on account of the operating of the mine,— this, as one court puts it, "supposing the tenant to have been capable and faithful."[3] This rule was announced at an early date by the Virginia court,[4] and has since been followed by that court in the case of the tenant operating lead mines[5] and iron mines,[6] by the supreme court of Pennsylvania in a coal mine case,[7] and by the West Virginia court in an oil and gas case;[8] while the California court recognizes substantially the same rule.[9] These cases present many cogent reasons for the rule announced, and generally may be safely followed.

[1] Early v. Friend, 16 Grat. 21, 78 Am. Dec. 649.

[2] See the next sections *post*.

[3] Graham v. Pierce, 19 Grat. 28, 100 Am. Dec. 658.

[4] Ruffner v. Lewis, 7 Leigh, 720.

[5] Graham v. Pierce, *supra*.

[6] Newman v. Newman, 27 Grat. 722.

[7] Winton Coal Co. v. Pancoast Coal Co., 170 Pa. St. 442, 33 Atl. Rep. 110.

[8] Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694.

[9] McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863.

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§ 1448. Matters for consideration in allowing rent to excluded co-tenant.— In making rent the measure of accountability the courts must take into consideration the question as to whether the non-assenting co-tenant is excluded from possession or not, as the operating co-tenant would not be liable for rent unless he was so excluded, nor unless the working tenant put it to some profitable use other than mere occupancy.[1] But, of course, where profit is derived by the operating tenant, and that is made the basis of accounting, the non-assenting co-tenant would be entitled to his share of the profits, whether allowed rent or not.[2]

§ 1449. Surplus over co-tenant's share.— The supreme court of Georgia, in considering the measure of accounting in case of operations by one co-tenant to the exclusion of the others, held it to be the surplus over the operating co-tenant's share, together with any profits derived therefrom by him.[3] The greatest objection to such a rule, however, would be, as previously noted,[4] the difficulty, if not impossibility, of determining what portion of the output is surplus. Unless the mine is worked to absolute exhaustion this could never be determined in anything like a practical manner. And whether the mine is exhausted would almost invariably be a question of fact concerning which reasonable men might easily differ. The better rule would seem to be to base the measure of accounting upon the value of the product already mined, estimated in some one of the modes here pointed out.

[1] Hamby v. Wall, 48 Ark. 135, 2 S. W. Rep. 705; Sailer v. Sailer, 41 N. J. Eq. 398, 5 Atl. Rep. 319; Varnum v. Leek, 65 Iowa, 751, 23 N. W. Rep. 151.

[2] Holmes v. Best, 58 Vt. 547, 5 Atl. Rep. 385; Almy v. Daniels, 15 R. I. 312, 4 Atl. Rep. 753, 10 Atl. Rep. 654; Scantlin v. Allison, 32 Kan. 376, 4 Pac. Rep. 618; Dodge v. Davis, 85 Iowa, 77; Carver v. Fennimore, 116 Ind. 236; Bowen v. Swander, 121 Ind. 164, 22 N. E. Rep. 725. See also *ante*, § 1447.

[3] Huff v. McDonald, 22 Ga. 131, 14 M. R. 262. See Docker v. Somes, 2 Myl. & K. 655; Story's Eq., §§ 445, 465.

[4] *Ante*, § 1435.

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§ 1450. Another measure — Value of coal at pit's mouth.— There is another line of authorities holding that the measure of accountability is the value of the product at the mine less the actual cost of mining.[1] There can be little objection to this mode of settlement if confined in its deductions to actual cost of mining, with indispensable dead work only, classed and counted as such, in addition to actual cost of breaking and raising.

§ 1451. Ore in place as measure of damages and account.— Another mode of stating practically the same thing is to fix the measure of accountability upon the basis of the value of the mineral in place.[2] This was recently done in Ohio, where one co-tenant had worked the mine under the impression that his co-tenants, who were minors, would convey their interests to him, which they failed to do.[3] The value in place, for this purpose, is usually estimated in the same manner as in the case of working out of bounds,[4] though the rule is generally less rigidly applied.[5] The question then arises, what is meant by, and what is to be considered as, the value of the mineral in place? It is well settled that each tenant in common has a right to get his own, even if in doing so he shall remove his co-tenant's share.[6] The answer, then, to the question is found in the language of the supreme court of Pennsylvania in announcing this rule as the measure of the account, where it is said by the court: "Where the mineral land has never been developed, and no mines or quarries have been opened, the fair market value of the mineral in place, which would be the value of the privilege of removing it, in view of all its special circum-

[1] Job v. Potton, L. R. 20 Eq. 84; Mercur v. State Line Co., 171 Pa. St. 12, 32 Atl. Rep. 1126.

[2] Fulmer's Appeal, 128 Pa. St. 24, 18 Atl. Rep. 493; Neel's Appeal, 3 Penny. 66; Clowser v. Joplin M. Co., 4 Dill. 469, 5 Fed. Cas., p. 1097; Coleman's Appeal, 62 Pa. St. 278; Burton Coal Co. v. Cox, 39 Md. 1, 10 M. R. 157, and cases.

[3] Keys v. Pittsburg & W. Coal Co., 58 Ohio St. 246, 41 L. R. A. 681.

[4] See *post*, §§ 1621, 1623.

[5] Fulmer's Appeal, *supra*.

[6] Coleman's Appeal, *supra;* Barton Coal Co. v. Cox, *supra*.

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stances, would represent the true measure of compensation to the owner. So, too, if the land were fully developed and mines or quarries opened, and all the expenses incurred which enable the operator to proceed at once to the taking out of the mineral, the value of the mineral in place, ready to be taken, would be enhanced by these considerations; and the price of the privilege of taking it, in such circumstances, would also represent the measure of compensation."[1]

The operating co-tenant then would deduct from the actual measured value in place, that is to say, the assay value or the cost in market, at least that portion thereof which he has to expend by reasonably prudent management in putting it in the market, or at least in putting it at the pit's mouth, but he is entitled to no profit for himself.[2]

§ 1452. Lien for expenditures — Equitable right to profits.— Cases may easily arise where the operating co-tenant will be given a lien upon the premises for expenditures by him before any accounting will be compelled. Where the property consists of unpatented mining claims, upon which the statutory assessment work must be done to prevent forfeiture, as we have seen,[3] the co-owner performing the work has his remedy provided by statute. But where this remedy is not invoked he would undoubtedly have his lien for assessment work performed, in any suit for accounting, but probably in no other case, as ordinarily, and with rare exceptions, the mode of enforcing contribution to assessment work fixed by statute by selling the interest is exclusive. Another instance is where the parties are co-tenants, and the property is worked, under a lease for instance, which provides for a certain amount of work within a specified time under penalty of forfeiture. Under such circumstances if one of the lessees performs the required work he should be entitled to claim a lien against the interests of

[1] Fulmer's Appeal, 128 Pa. St. 24, 18 Atl. Rep. 493.

[2] Fulmer's Appeal, *supra*.

[3] *Ante*, § 1431.

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his co-lessees for their share of the expenditures.[1] For, of course, without such work, the entire estate would be lost to both parties.

§ 1453. What may be offset — Repairs, taxes, etc.— Wherever the working co-tenant has conducted his operations in a prudent and careful manner, a court of equity will, as intimated in a previous section,[2] generally allow him to charge against his fellows any sums actually and in good faith necessarily expended by him in working the property. This rule has been applied in West Virginia to the extent of allowing a co-tenant as to three-tenths, and a life tenant as to the remaining seven-tenths, to credit himself with all outlay by him in producing oil, including the cost of productive wells,[3] and this notwithstanding the fact that the court held Jones to have no right to open new oil wells upon the premises. The court is also supported by other authorities.[4] Of course, any expense amounting to a common and necessary burden, such as taxes, and any other necessary expenses for the preservation of the property, is unquestionably chargeable in the account.[5]

§ 1454. Whether agreement necessary.— Some of the authorities seem to hold that before one co-tenant can claim any portion of the expenses of his operations from the other, there must be an agreement on the part of that other to bear his portion thereof.[6] But an examination of the Ne-

[1] Beck v. O'Conner, 21 Mont. 109, 53 Pac. Rep. 94, citing Prentice v. Janssen, 79 N. Y. 478; Jenkins v. Jenkins (N. J. Ch.), 5 Atl. Rep. 134; Eads v. Retherford, 114 Ind. 273, 16 N. E. Rep. 587; Holbrooke v. Harrington (Cal.), 36 Pac. Rep. 365; Freem. Co-ten., 322. See also Stenger v. Edwards, 70 Ill. 631.

[2] *Ante*, § 1447.

[3] Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694.

[4] Ruffner v. Lewis, 7 Leigh, 720, 30 Am. Dec. 513.

[5] Stenger v. Edwards, 70 Ill. 631; Neuman v. Dreifurst, 9 Colo. 228, 11 Pac. Rep. 98; Graham v. Pierce, 19 Gratt. 28; Eads v. Retherford, 114 Ind. 273, 16 N. E. Rep. 587. See also Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188.

[6] Welland v. Williams, 21 Nev. 230, 29 Pac. Rep. 403, citing Freem. Co-ten., § 262; Calvert v. Aldrich,

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vada case discloses that it was not an action for an accounting in which these were attempted to be offset, but a suit by one against the other to recover back a portion of the moneys voluntarily expended in operations, the returns from which failed to pay the expenditures. In such case, of course, an agreement is necessary in order to charge the non-operating co-owner. Of course circumstances may arise when the co-tenant would be made liable by ratification, such as adopting the fruits of the enterprise, with full knowledge, or the like.[1]

§ 1455. What acts of individual co-tenant inure to the benefit of all.— The rule as to what acts of a co-tenant inure to the benefit of all is not different in mining law from the general law. If the co-tenant is dealing openly and at arm's length and on his own account, he deals for himself; on the other hand, if the trust relationship or trust property forms the basis of his operations, his acts inure to the benefit of all co-tenants alike.[2] So, upon the same principle, when one tenant in common holds the interests of co-tenants in trust, and acquires other adjoining territory and applies for patent for all, the additional territory, being secured for the purpose of strengthening the title to the other, inures to the benefit of all.[3]

§ 1456. Purchases by and from co-tenants.— This principle is applied equally to dealings between co-tenants, that is, where the interest of one is bought by another, as where property is purchased from strangers.[4] And it is now set-

99 Mass. 74; Alleman v. Hawley, 117 Ind. 532, 20 N. E. Rep. 441.

[1] Welland v. Williams, 21 Nev. 230, 29 Pac. Rep. 403; Pickering v. Pickering, 63 N. H. 468, 3 Atl. Rep. 744; Alden v. Carleton, 81 Me. 358, 17 Atl. Rep. 299.

[2] Tisdale v. Tisdale, 2 Sneed, 597; Gibson v. Winslow, 46 Pa. St. 380; Lloyd v. Lynch, 28 Pa. St. 419; Jones v. Stanton, 11 Mo. 433; Van Horne v. Fonda, 5 Johns. Ch. 406; Halsey v. Blood, 29 Pa. St. 319; Freem. Co-ten., §§ 151, 152, 154, 156.

[3] Hallack v. Traber, 25 Colo. 14, 46 Pac. Rep. 110. See also Turner v. Sawyer, 150 U. S. 578.

[4] Bissell v. Foss, 114 U. S. 352, affirming s. c., First Nat. Bank v.

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tled that co-tenants may deal directly each with the other, either singly or by more than one on each side,[1] and that unless there are circumstances of trust which include others, it will be confined in its result to those actually participating.[2]

§ 1457. Same — Interest of one purchased by another does not inure to benefit of third.— That the purchase by one tenant in common of an outstanding title or incumbrance upon the property will generally inure to the benefit of all by reason of privity of interest, which prevents one from purchasing outstanding title to the exclusion of the others, is settled.[3] But this rule will not usually apply where one or more co-tenants purchase the interests of others in the common property, as was noticed in the last section. In such case the interest thus purchased only inures to the benefit of the parties participating in the purchase, and not to other co-tenants not joining it.[4] This rule was recognized by the supreme court of the United States in the case just cited. In this case it seems that, by reason of a partially consummated arrangement between Bissell and Foss, two of the owners, there was a sort of fiduciary relationship between them, it having been arranged between them that they would purchase the interest of another co-tenant and hold the same jointly. This was not done, but Foss joined with a third and purchased the interest. The court held that this interest did not inure to the benefit of Bissell, notwithstanding the previous negotiations. Perhaps this case is somewhat extreme, but it announces the rule which

Bissell, 2 McCrary, 73, 4 Fed. Rep. 694; Bradbury v. Barnes, 19 Cal. 120; Reed v. Spicer, 27 Cal. 57.

[1] Freem. Co-ten., § 165; Alexander v. Kennedy, 3 Grant's Cas. 380; First Nat. Bank v. Bissell, 4 Fed. Rep. 694. See also next section.

[2] Bank v. Bissell, *supra;* Bissell v. Foss, *supra.*

[3] Freem. Co-ten., § 154; Rothwell v. Dewees, 2 Black, 613; Van Horne v. Fonda, 2 Johns. Ch. 388; Lloyd v. Lynch, 28 Pa. St. 419; Downer v. Smith, 38 Vt. 464.

[4] Bissell v. Foss, 114 U. S. 252, affirming s. c., First Nat. Bank of Denver v. Bissell, 2 McCrary, 73, 4 Fed. Rep. 694.

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must apply in such cases. The interest of a co-tenant not attempting to hold adversely can never constitute an outstanding title or incumbrance against the property, or the interest of the others in it. Therefore, the rule applicable in such case should not be attempted to be invoked here.

§ 1458. Further as to rights and duties of co-tenants — Action for damages.— In addition to the remedies by one co-tenant against another, already noticed,[1] for exclusive operations, the right to sue for damages in addition to an action for an accounting, or in partition, was recently recognized by the supreme court of Nevada.[2] It must be borne in mind, though, whatever the nature of the remedy sought to be invoked, that the machinery of the law will never be made the engine of oppression; and realizing that in mining especially, without risk, there is no profit for any one, the courts will always, if possible, so determine the rights of the parties that exact and substantial justice will be done between them. Pursuing this principle, as we have seen,[3] expenditures for sinking wells and buildings completed or in course of construction have been credited in the accounting. The justice of this would seem to be apparent. Demand is made upon the energetic co-tenant for a portion of the profits which have been realized by reason of his push and courage, and this should only be decreed upon condition that it be charged with its proportion of the expenses.[4] Any other rule would violate the principle of equity that it is not right that any one should grow rich to the detriment or injury of another.

§ 1459. Fixtures and improvements — Ownership of.— Manifestly, the rule which governs fixtures and improvements placed on property by a lessee or licensee, and the rule which governs trade fixtures between landlord and

[1] *Ante*, § 1446 *et seq.*

[2] Paul v. Cragnas (Nev.), 59 Pac. Rep. 857, 47 L. R. A. 540.

[3] *Ante*, § 1453.

[4] McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863.

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tenant, must apply with equal force to the fixtures and improvements placed upon property by the operating co-tenant, since his relationship to the real property is not different in principle. Whence it follows that improvements, machinery and fixtures placed upon a mine by an operating co-tenant are his property and may be removed by him. In a case in the circuit court for the district of Utah, H. and D. were operating co-tenants and acquired certain machinery and made improvements, of which U. afterwards became the owner. He attempted to remove the machinery, when plaintiff, a non-assenting co-tenant, brought an action of waste. The case was tried before Judge Hallett, sitting specially, who directed a verdict for the defendants, holding, orally, that the doctrine of trade fixtures applied, and that the operating co-tenant had the right to remove machinery placed there by him, and that he was not impeachable for waste therefor.[1] But it has been held, as we have seen, under the peculiar conditions of a lease which had become forfeited, that the landlord becomes entitled in some cases to withhold the fixtures.[2] Of course, where there has been an accounting, and the cost of these fixtures charged to the co-tenancy, their removal should not be permitted.[3]

§ 1460. Injunctions by and against co-tenants.— In the absence of statute changing the common-law relationship of tenants in common towards each other, courts will be slow to interfere upon either side with the remedy of injunction; yet this remedy will not be denied in cases of extreme hardship where there is wrongful operation or wrongful interference. Thus, in Montana, under a statute which reads: "If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy

[1] Holden v. Utah & Montana Machinery Co., C. C. Dist. of Utah, 1899 (not officially reported).

[2] Mass. Nat. Bank v. Shinn, 46 N. Y. S. 329; affirmed, 57 N. E. Rep. 611. See *ante*, § 1316.

[3] Nature of accounting discussed *ante*, § 1445 *et seq.*

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or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist," it was held that the non-assenting co-tenant was entitled to an injunction restraining his co-tenant from operating the mine.[1] This peculiar doctrine would be the deathblow to mining, and to the credit of all other states, be it said, it does not obtain elsewhere. In all such cases there should be, and we apprehend that when the law is accurately understood there will be, a distinction between use and abuse. As we have attempted to outline the rule in these sections, it seems well settled that any co-tenant in possession of a mine may mine in the usual course in which such mining is carried on, and not be liable to answer in the courts to any greater remedy than that sought for an accounting for rent or for a portion of the proceeds. And certainly, for honest, careful, prudent mining, the remedy by injunction should never be countenanced, sanctioned or granted.

§ 1461. Injunction in proper cases.— No conclusion, however, should be drawn from the foregoing to the effect that an injunction should not and will not be issued in a proper case to prevent irreparable injury. Mr. Lindley says: "Courts of equity have gradually enlarged their jurisdiction, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law."[2] But in all such

[1] Anaconda G. M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. Rep. 524. See also, as enunciating the same doctrine, Red Mountain Cons. M. Co. v. Esler, 18 Mont. 174, 44 Pac. Rep. 528; Butte & B. Cons. M. Co. v. Montana Ore Purchasing Co. (Mont., 1900), 60 Pac. Rep. 1039.

[2] Lindl. Mines, § 790, p. 987. See also Spear v. Cutter, 5 Barb. 486; Hart v. Mayor, etc., 8 Paige, 214; Winship v. Pitts, id. 259; New York Printing & Dyeing Est. v. Fitch, 1 Paige, 97, 99; Hanson v. Gardner, 7 Ves. Jr. 305, 308; Livingston v. Livingston, 6 Johns. Ch. 497; Kane v. Vanderburgh, 1 Johns. Ch. 11; Obert v. Obert, 5 N. J. Eq. 397. See *ante*, §§ 1228–1234.

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cases, obviously, it would not be enough to show that the co-tenant was actually removing and converting the ore. He has a perfect right to do that; but there must be the further showing that some serious, extraordinary, hostile work is being carried on for which the ordinary action for an accounting or for damages will afford no adequate remedy, or circumstances showing the defendant's inability to respond; such, for instance, as the insolvency of the defendant or similar unusual conditions.

§ 1462. Equity — Pennsylvania doctrine — Other remedies.— It has been held in Pennsylvania and by the earlier cases elsewhere, that equity will not entertain a bill for an accounting nor restrain the commission of waste until all legal rights have been vindicated in the law side of court.[1] But the later and better doctrine, as we shall see later on, does not require this, and in a proper case equity will interfere to protect by injunction the rights of litigants, where great injury is imminent which could only be redressed, if at all, by a multiplicity of suits, or where waste would result, or where the wrong-doer is insolvent and the applicant shows a clear right.[2]

§ 1463. When lessor liable for trespass.— It has been held that the lessors of a coal vein are liable as co-trespassers with their tenants, they having contributed toward the expense, and authorized the sinking of a slope by means of which their tenant has taken coal from an adjoining landowner, under the belief that the slope would not extend beyond their own lines.[3] This, of course, upon the theory

[1] North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. 488, citing Hawley v. Clowes, 2 Johns. Ch. 122; Bishop of Eli v. Kendrick, Busb. 322; Coxe v. Smith, 4 Johns. Ch. 271; Phelps v. Green, 8 id. 302, followed in Frisbee v. Irvin, 88 Pa. St. 144. See also Tilly v. Bridges, Brec. Ch. 252; Norton v. Frecker, 1 Atk. 524; Sayer v. Pierce, 1 Ves. Sr. 232, 1 M. R. 72; Norris' Appeal, 14 P. F. Smith, 275; Tillmes v. Marsh, 17 id. 507; Christie & Scott's Appeal, 4 Norris, 465.

[2] See *ante*, §§ 1228–1234.

[3] Dundas v. Muhlenburg's Ex'rs,

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that all were joint tort-feasors, the lessors equally with their tenants, because they appeared to authorize the wrong, or were negligent. We cannot conceive of any other circumstances which would make them liable.

Article B.

Rights and Duties as to Third Parties.

§ 1470. Preliminary — Scope of treatment.
1471. License of single co-tenant.
1472. Same — Special cases.
1473. Limitations — A mixed case.
1474. Suit by single co-tenant.
1475. Joinder of tenants in common.
1476. Tenant in common holding as trustee — Michigan statute.
1477. Interests equal.

§ 1470. Preliminary — Scope of treatment.— The rights and liabilities of tenants in common as to third parties are manifestly different from those between themselves. It is not the purpose of this work to deal extensively with the subject. Other works have traversed that field specially, and we are only concerned with the special features applicable to mining.

§ 1471. License of single co-tenant.— Whether the license of one co-tenant to do a particular act with reference to the property of a co-tenancy will protect the licensee against the other co-tenants seems not well settled. On principle it would seem that where one co-tenant could himself lawfully perform an act with reference to property belonging to the tenancy, he could lawfully authorize another to do the same thing,[1] this being but a practical application of the maxim *Qui facit per alium, facit per se.*

35 Pa. St. 351. See *post*, "Working Out of Bounds."

[1] Job v. Potton, 20 L. J. Eq. 84. See also McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863. Compare Tipping v. Robins, 64 Wis. 546, 25 N. W. Rep. 713; Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925.

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And in the case above cited it was held that the license of some of the co-tenants of plaintiff was sufficient to protect the defendant from accountability, since he had left plaintiff's share in the mine.[1] But the principle ought not to rest upon the question whether the plaintiff's share was in the mine, but upon an entirely different principle, namely, that if it is lawful for one co-tenant to work the common property in a prudent, safe and miner-like manner, there could be no question, it would seem, as to his authority to permit another to do so; provided, of course, that the co-tenant not joining was not thereby injured to a greater extent than he would be if the co-tenant granting the license mined it himself. In other words, they should not be made liable for a profit made by the licensing co-tenant, nor a profit made by the licensee; but if these two were eliminated from the accounting, and the profit, if any, taken solely from the licensing co-tenant's interest, the non-assenting co-tenant would have no cause for complaint.

§ 1472. **Same — Special cases.**— In the circuit court for the eastern district of Missouri it was ruled by Judge Treat, charging the jury, that one co-tenant could give a license as to property owned by himself and a co-tenant, which would protect the licensee in an action of trespass or replevin.[2] In California, where there were two companies or sets of claimants asserting title to a lot of tailings deposited on certain ground, and a party who was interested as tenant in common in both titles received and accounted to one of the companies for certain profits from working the tailings, it was held that he could not be called to account by a member of the other company as tenant in common with him.[3]

§ 1473. **Limitations — A mixed case.**— The license of one co-tenant, however, has not always been held sufficient

[1] Job v. Potton, 20 L. J. Eq. 84.

[2] Williams v. Morrison, 28 Fed. Rep. 872.

[3] Clark v. Jones, 49 Cal. 619. See also, supporting the principle of the text, McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 Pac. Rep. 863.

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to protect the licensee in his possession as against the others. For instance, in a recent Colorado case, it was held that the license of a co-tenant protected the licensee against an action of trover for removing the ores, only so far as the interest of such co-tenant was concerned, and that he was liable in such an action to the other co-tenants for their share.[1] The court justified this position by the statement that a licensee of a co-tenant could acquire no greater rights than the co-tenant himself, which is correct. But it announced, by way of dictum, the further doctrine than one would be liable to the others, in an action of trover, for the removal of ores from the common property, which we think is not correct. He should be held liable to an accounting, but not otherwise.[2]

§ **1474. Suit by single co-tenant.**— Since a stranger to the title, having no higher authority than mere possession, cannot question the good faith in a suit brought by one of the owners of the true title, one tenant in common may maintain an action against such person without joining his co-tenant with him.[3] But in such case a tenant in common suing for only a part interest in the property cannot recover judgment for the whole.[4]

§ **1475. Joinder of tenants in common.**— Where one party suing for the benefit of himself and his co-tenants seeks by his action to recover possession of the common property from strangers, it is not necessary to join such co-tenants; it is only necessary to sue the parties who interfere with his rights, since as trespassers they cannot question his right to maintain the action.[5] But tenants in common

[1] Omaha & Grant S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925.

[2] *Ante*, § 1445 *et seq.*

[3] Rowe v. Bacigallupi, 21 Cal. 633; Waring v. Crow, 11 Cal. 367; Weise v. Barker, 7 Colo. 178, 2 Pac. Rep. 919; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280; Brown v. Warren, 16 Nev. 229; Himes v. Johnson, 61 Cal. 259.

[4] Bullion M. Co. v. Croesus M. Co., 2 Nev. 168.

[5] Waring v. Crow, 11 Cal. 367.

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may join and generally should do so.[1] Thus, where several tenants in common of mines, owning unequal interests, unite in a joint lease, the covenants are joint and not several, and suit for the breach of covenant must be brought by all of the survivors; and this though the demise was according to their respective interests, and the rents were to be rendered accordingly.[2]

§ 1476. Tenant in common holding as trustee — Michigan statute.— Under a Michigan statute requiring a trust to be fully expressed and clearly defined on the face of the instrument creating it,[3] and another statute providing that in the creation of trusts no estate or interest shall vest in the trustee,[4] where one party furnished the money, and in the instrument receiving the title he was described as trustee of certain mining lands, and letters between the parties contemporaneously showed the purpose of the trust, it was held sufficient.[5]

§ 1477. Interests equal.— The presumption of the common law is that the interests of co-tenants are equal, in the absence of a clear showing to the contrary.[6] But of course this, like all presumptions, only stands until overcome by proof to the contrary.

ARTICLE C.

Partition.

§ 1485. Partition between co-tenants — Mines capable of partition.
1486. Mode of partition — Partition of product.
1487. Illegal contracts not within the rule.
1488. Cornwall ore banks in Pennsylvania.
1489. Conveyances.
1490. Summary — The doctrine of this chapter restated.

[1] Goller v. Fett, 80 Cal. 482; Touchard v. Keyes, 21 Cal. 208.

[2] Bradburne v. Botfield, 14 M. & W. 559, 14 M. R. 355.

[3] 2 How. Ann. Stat., § 5573.

[4] 2 How. Ann. Stat., § 1446.

[5] Loring v. Palmer, 118 U. S. 321, citing Campau v. Campau, 44 Mich. 31; Eberts v. Fisher, id. 553; Burdeno v. Amperse, 14 Mich. 96; Ready v. Kearsley, id. 227; Steevens v. Earles, 25 Mich. 44; Thompson v. Waters, id. 234; Goodrich v. Milwaukee, 24 Wis. 430.

[6] Loring v. Palmer, 118 U. S. 321; Campau v. Campau, 44 Mich. 31;

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§ 1485. Partition between co-tenants — Mines capable of partition.— Some of the early authorities in England inclined to the notion that mines could not be partitioned.[1] But whether that rule ever obtained to any extent in this country it is unnecessary to inquire, inasmuch as it is now well settled and recognized as a general rule that all mines and mining interests may become the subject of partition.[2] And this extends not only to mining claims patented and unpatented in the precious metal bearing states,[3] but also applies with equal force to the severed estates held by co-tenants in the coal and iron mining regions.[4]

§ 1486. Mode of partition — Partition of product.— Where each portion cannot be equitably set off by partition agreeably to the usual custom in such cases, a sale will be ordered and the proceeds divided.[5] The general rule is that dissolution of the relationship and accounting of the property go hand in hand.[6] In many of the states this matter is regulated by statute, but it would serve no useful purpose to repeat the statutes or give the substance of their provisions. It has been held that even though there be a cove-

Eberts v. Fisher, 44 Mich. 553. See Rowell v. Bodfish, 10 Atl. Rep. 445.

[1] Lord Mountjoy Case, Godb. 17; Conant v. Smith, 1 Atk. 67. See Lenfers v. Henke, 73 Ill. 405; Kemble v. Kemble, 44 N. J. Eq. 454.

[2] Aspen M. & S. Co. v. Rucker, 28 Fed. Rep. 220; Strattell v. Ballou, 9 Fed. Rep. 256; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634, 9 Fed. Cas. 592, No. 4,989; Kinney v. Cons. Virginia M. Co., 4 Sawy. 382, 14 Fed. Cas. 611, No. 7,827; Hughes v. Devlin, 23 Cal. 501; Nisbet v. Nash, 52 Cal. 540; Mitchell v. Cline, 84 Cal. 409, 24 Pac. Rep. 164; Ames v. Ames, 160 Ill. 599; Adam v. Briggs Iron Co., 7 Cush. 361; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Kemble v. Kemble, *supra;* Christy's Appeal, 110 Pa. St. 24. See Coleman v. Coleman, 19 Pa. St. 100; Canfield v. Ford, 28 Barb. 336; Dall v. Confidence S. M. Co., 3 Nev. 531; Morrill v. Morrill, 5 N. H. 136.

[3] Aspen M. & S. Co. v. Rucker, *supra;* Dall v. Confidence S. M. Co., *supra;* Nisbet v. Nash, *supra;* Mitchell v. Cline, *supra.*

[4] See authorities, note 2, *supra.*

[5] Dall v. Confidence S. M. Co., 3 Nev. 531; Wild v. Milne, 26 Beav. 504; Crawshay v. Maule, 1 Swanst. Ch. 495; Lenfers v. Henke, 73 Ill. 405; Lorenz v. Jacobs, 59 Cal. 262; McGillivray v. Evans, 27 Cal. 92.

[6] Nisbet v. Nash, 52 Cal. 540.

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nant between the parties running with the land to the effect that the mine shall never be partitioned, the ore produced from the mine may nevertheless be the subject of partition.[1]

§ 1487. Illegal contracts not within the rule.— But the rights of parties only extend to such contracts and relations as are honest and untainted with fraud. Thus, in California, plaintiff's and defendant's ancestors and others, for the purpose of locating more public mineral land than they otherwise would have been entitled to, associated with them certain persons in the character of "dummy" locators, that is, persons having no interest, and thus located sixty acres more placer ground than they otherwise could have acquired, all of which they sought to partition. In denying their standing in court it was said: "Now that they have succeeded in thus obtaining the land, will a court of equity stoop to investigate those parts of the agreements and understandings relating to a division of that land among the conspirators? I think not.[2] The following language of this court[3] is applicable to this case: 'The entire transaction between the parties is tainted with fraud, and the plaintiff must content himself with so much of the benefit of it as he has already procured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good requires that this transaction should be held void in all its parts. It was a contract which contemplated the perpetration of a fraud on a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power.' In the case at bar a fraud upon the government was not only contemplated, but was actually and successfully perpetrated; and the appellants are shown to have

[1] Coleman v. Coleman, 19 Pa. St. 100; Coleman's Appeal, 62 Pa. St. 252.

[2] Citing Civil Code, § 1667: Damrell v. Meyer, 40 Cal. 166; Huston v. Walker, 47 Cal. 484; Snow v. Kimmer, 52 Cal. 624.

[3] Beard v. Beard, 65 Cal. 356, 4 Pac. Rep. 229.

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'secured unchallenged' about one-half of the benefits thereof, with which they should content themselves. See also Pomeroy's Equity Jurisprudence,[1] where, among other things in point here, it is said: 'Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves.'"[2]

§ 1488. **Cornwall ore banks in Pennsylvania.**— Respecting this celebrated estate which has occasioned so much litigation, it is now settled that the covenant not to partition runs with the land, and exempts it from the general rule. The Cornwall furnace and ore banks were a part of the Cornwall estate so called, and were in 1786 the property by devise of Burd Grubb and Henry Bates Grubb, Curtis Grubb and Robert Coleman, co-tenants with their ancestor. They were segregated from the main body of the estate on August 30, 1787, by an agreement containing this proviso: "provided always, and it is hereby agreed, that the ore banks belonging to the Cornwall furnace shall remain together and undivided as a tenancy in common, the said Curtis Grubb being entitled to three-sixths parts thereof, the said Robert Coleman being entitled to one-sixth part thereof, and the said minor children (Burd Grubb and Henry Bates Grubb) being entitled to the remaining two-sixths parts thereof, and that for this purpose an accurate survey shall be made of the said ore banks and hills, if not already done; and it is hereby declared to be the true intent and meaning thereof that neither of said parties, their agents or workmen, shall interfere or interrupt either of

[1] 1 Pom. Eq. Jur., § 401.
[2] Mitchell v. Cline, 84 Cal. 409, 24 Pac. Rep. 164, 166.

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the other parties at any mine hole by them occupied for the purpose of raising ore."

In all the litigation respecting those ore banks or the ore taken therefrom, this agreement has played an important part in defining their rights, and it has been frequently held that it is a covenant running with the land, which prevents partition.[1] In some of these cases there was no dispute as to the effect of the contract, but only as to the correctness of two different surveys by which a sort of temporary partition was effected, and certain mine holes set off, temporarily or for life, to different co-tenants.[2]

In Grubb's Appeal[3] it was held that the two sons of H. B. Grubb (one of the successors in estate of one of the original owners) were tenants in common and not partners notwithstanding they mined together. It will be noticed that the agreement referred to the ore in the ore banks, and not to the furnace itself; by certain partition proceedings and conveyances, this furnace became the property of Alfred B. Grubb, and in two cases it was decided that by the acquisition of this furnace he secured a limited right, never accurately determined, to take a customary amount of ore from the ore beds for this furnace, the Mount Hope furnace.[4]

§ 1489. Conveyances.— The law relative to conveyances between each other has received attention; it is settled that a conveyance by one co-tenant of an aliquot part of the common property, by metes and bounds, is absolutely void.[5]

[1] See Coleman's Appeal, 62 Pa. St. 252; Coleman v. Coleman, 19 Pa. St. 100; Grubb v. Grubb, 74 Pa. St. 25; Coleman v. Grubb, 23 Pa. St. 393; Blewett v. Coleman, 40 Pa. St. 45; s. c., Coleman v. Blewett, 43 Pa. St. 176; Grubb's Appeal, 66 Pa. St. 117; Grubb's Appeal, 90 Pa. St. 228; Grubb v. Grubb, 101 Pa. St. 11.

[2] See Coleman v. Grubb, *supra;* Blewett v. Coleman, *supra.*

[3] Grubb's Appeal, *supra.*

[4] Grubb v. Grubb, 74 Pa. St. 25; Grubb's Appeal, 90 Pa. St. 228. See also Grubb v. Grubb, 101 Pa. St. 11.

[5] Adam v. Briggs Iron Co., 7 Cush. 361; Bartlett v. Harlow, 12

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The only manner in which one co-tenant may legally convey his interest is by describing it as a certain undivided part of the whole, or all his right, title and interest therein.[1]

§ 1490. Summary — The doctrine of this chapter restated. — Within the limits necessary for the purposes of this work, the doctrine of co-tenancy, as applied to mining, may be thus summarized:

(*a*) A co-tenancy exists whenever two or more persons or corporations own mining interests in undivided portions.

(*b*) The doctrine which governs mining partnerships, that it requires a majority, either in numbers or interest, to work the mining property owned by them, has no application to a co-tenancy. But a mine so owned may be fairly and carefully worked by any co-tenant however small his interest.

(*c*) The operating co-tenant is bound to account to all the other non-consenting co-tenants, and may be compelled to do so by the proper action, and the measure of the account is generally the fair profits derived from prudent working of the property.

(*d*) It is not waste to work a mine in the ordinary way, if worked in a safe, prudent and careful manner.

(*e*) The operating co-tenant has the right of removal of all fixtures and machinery placed thereon by him, under the same circumstances, and no others, that a lessee could. Besides this right, he may also, if he desires and so elects, charge the reasonable value of necessary fixtures in his accounting with his co-tenants, and recover the same out of the proceeds, if not otherwise.

(*f*) Each co-tenant deals with all others at arm's length, and may lawfully buy or sell with, from or to them.

(*g*) The license of a tenant in common will protect a licensee in an action for damages, and may even be sufficient

Mass. 348; Varrum v. Abbot, 12 Pick. 283; Baldwin v. Whiting, 13 Mass. 57; Peabody v. Minot, 24 Mass. 474; Blossom v. Brightman, Pick. 329.

[1] See cases, note 5, *ante*, p. 1121.

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to maintain an action for possession, or resist the action of an ousted co-tenant.

(*h*) Partition may be had of mining property the same as any other, and under the same circumstances; and if a mine cannot be partitioned without sale, it may be sold and the proceeds divided.

(*i*) A co-tenant cannot legally convey his interest by metes and bounds.

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CHAPTER II.

MINING PARTNERSHIPS.

ARTICLE A.

General History — The Cost Book.

§ 1500. Historical — Leading distinction between partners and tenants in common.
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1516. Mining under general partnership.
1517. Mere joint ownership not sufficient — Must work mines.
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§ 1500. Historical — Leading distinction between mining partners and tenants in common.— Mining partnerships have existed, both in this country and in England, since a very early period; by them, nearly as much as by other associations, mines have been operated nearly all of this century. The peculiar rights of mining partners as between themselves and third persons have received distinct recognition by the courts, from the time of Lord

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Eldon at least. The legal status of mining partners towards each other, as recognized by the law, savors very strongly and partakes largely of the doctrine which controls the rights of tenants in common in an ordinary co-tenancy, but there are a few features of it which resemble trading or commercial partnerships. Yet it is peculiarly *sui generis* as respects its governing principles, and is neither a tenancy in common as to all the rights of participants or members, nor yet a general or commercial partnership, as we shall attempt to demonstrate further on. There are at least two essential differences between a mining partnership and an ordinary trading or commercial partnership. First, the right of selection of persons in the latter, which does not exist in the former; and second, the agency of the partners, which is likewise an absent feature in mining partnerships. There are many nice differences between it and a tenancy in common, and we will proceed to notice them.

§ 1501. Definition — When relation exists. — A mining partnership may be said to exist when two or more persons owning mines or an interest therein voluntarily associate themselves together and actually work the mines.[1] Some statutory definitions have enlarged or restricted this one,

[1] Bainb. Mines, 334, 335, 340; Coll. Mines, 88; Vice v. Lady Anson, 7 B. & C. 409, 1 Man. & R. 113; Tredwen v. Bourne, 6 M. & W. 461; Ralph v. Harvey, Richards v. Harvey, 1 Q. B. 845; Jefferys v. Smith, 1 Jac. & W. 298; Brown v. Kidger, 3 H. & N. 853; Fereday v. Wightwick, 1 Rus. & M. 45; Phillips v. Phillips, 1 Myl. & K. 649; Bybee v. Hackett, 12 Fed. Rep. 649; Santa Clara M. Ass'n v. Quicksilver M. Co., 17 Fed. Rep. 657, 8 Sawy. 330; Bissell v. Foss, 114 U. S. 252; First Nat. Bank v. Bissell, 4 Fed. Rep. 694, 2 McCrary, 73; Kahn v. Central S. Co., 102 U. S. 641; Duryea v. Burt, 28 Cal. 569; Skillman v. Lachman, 23 Cal. 199; Doherty v. Creary, 30 Cal. 290; Settembre v. Putnam, 30 Cal. 490; Taylor v. Castle, 42 Cal. 367; Henderson v. Allen, 23 Cal. 519; Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970; Berry v. Woodburn, 107 Cal. 504, 40 Pac. Rep. 802; Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880; Dorsey v. Newcomer, 121 Cal. 218, 53 Pac. Rep. 557; Ferris v. Baker, 127 Cal. 520, 59 Pac. Rep. 937; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. Rep. 232; Charles v. Eshleman, 5 Colo. 107; Hodgson v. Fowler, 24 Colo. 278, 50 Pac. Rep. 1034; Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. Rep. 664;

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but are generally within it. The California statute reads as follows: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.[1]

§ 1502. Mining partnership in general — Lord Eldon's views.— This matter was carefully considered by Lord Eldon in a celebrated case. The matter in controversy arose under a lease, wherein the former Mr. Crawshay, who had a leasehold interest in certain iron mines for ninety-nine years, transferred to Bailey sufficient interest to make him a one-fourth owner, and by a codicil to his will he gave three-eighths to his son William Crawshay, and the other three-eighths were to go to Hall, his executor, for certain purposes. There were never any articles of copartnership; but the business was carried on as Crawshay, Hall & Bailey. Crawshay succeeded to the interest of Bailey, and on the death of Hall he claimed that the partnership became dissolved; but it was contended, on the other hand, that it continued to the expiration of the lease. The court, in passing upon certain interlocutory matters, held that a mining partnership was a species of trading concern, but was of the opinion, while not so deciding, that death of one of the partners would dissolve the partnership, except for the purpose of winding up

Caley v. Coggswell, 12 Colo. App. 394, 55 Pac. Rep. 939; Kayser v. Mongham, 8 Colo. 232, 6 Pac. Rep. 803; Lyman v. Schwartz, 13 Colo. App. 31, 57 Pac. Rep. 735; Perkins v. Peterson, 2 Colo. App. 242, 29 Pac. Rep. 1135; Haskins v. Curran, 43 Pac. Rep. 559; Judge v. Braswell, 18 Bush, 67; Snyder v. Burnham, 77 Mo. 52; Burgan v. Lyell, 2 Mich. 102; Butterfield v. Beardsley, 28 Mich. 412; Nolan v. Lovelock, 1 Mont. 224; Hirbour v. Reeding, 3 Mont. 13; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. Rep. 318; McIntosh v. Perkins, 13 Mont. 143, 32 Pac. Rep. 653; Anaconda Copper M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. Rep. 924; Randall v. Meredith, 76 Tex. 669, 11 S. W. Rep. 170; Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828; Yale, Mines, pp. 220, 221.

[1] Cal. Civ. Code, § 2511. See also for further provisions §§ 2512, 2520. See also Rev. Stat. Idaho, Civ. Code, §§ 2774, 2783; Civil Code Montana, §§ 3350, 3359; Nevada Act of 1899, in relation to mining claims, Sess. Laws 1899, p. 93 *et seq.*

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its affairs. It was further held, however, without pointing out the distinctions, that it was not the same as the general partnership, nor yet the same as a joint-stock company. Upon coming in of the master's report, a compromise sale was approved and the entire question was therefore never finally determined in that case.[1]

§ 1503. Death does not dissolve — Question finally decided.— The distinction between mining and trading partnerships came squarely for decision before Sir James Leach, M. R., in 1829, and he there decided as follows: "It is true a mining concern differs in some particulars from a common partnership. The shares are assignable, and death or bankruptcy of the holder of shares does not operate as a dissolution, but it has been repeatedly held to be in the nature of a trading concern."[2] In a later case he said: "I confess, I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate; and in the case of Fereday v. Wightwick I had no intention to confine the principle to the partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion, and general convenience requires that this principle should be adhered to."[3] But in another case[4] it was held that the mere ownership by one of the parties of a certificate in a partnership or cost-book concern, the creditor not knowing that the holder was in fact a partner, and not giving credit to her personally, would not make her liable.[5]

[1] Crawshay v. Maule, 1 Swanst. Ch. 495, 11 M. R. 223.

[2] Fereday v. Wightwick, 1 Rus. & M. 45, 1 Tam. 250, citing Crawshay v. Maule, 1 Swanst. Ch. 495.

[3] Phillips v. Phillips, 1 Myl. & K. 649. See also Randall v. Randall, 7 Sim. 271.

[4] Vice v. Lady Anson, 7 D. & C. 409. 1 Man. & R. 113, 3 C. & P. 19.

[5] Lawler v. Kershaw, 1 Moo. & Mal. 93. See Merrick v. Peru Coal Co., 61 Ill. 472, 79 Ill. 113.

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§ 1504. When partnership may be said to exist and what constitutes — Extent of liability. — Not every ownership of mines as tenants in common or co-tenants constitutes a mining partnership. It is only when the owners decide to operate them as such that the relationship exists. It may be said to exist where several owners co-operate in the operation of the mine; and their liability, certainly as between themselves and generally as between all others with whom they deal, is proportioned to the extent of their interest in the property.[1] But in Missouri it was held that persons jointly conducting a mining venture are partners, though there was no agreement for a partnership;[2] and lessees operating a lease are generally partners.[3]

In a late case in California it was held, under the civil code of that state, that a contract by which a stranger agrees to work the mine, paying one-half of the expense and receiving one-half of the product as compensation, does not constitute him a partner.[4] In this last case the supreme court of California indulged very largely in dictum not necessary to the decision of the case, and attempted on a different state of facts to overturn some of the decisions of that court in previous cases, resting their authority in so doing upon the statement, "There is no good reason in saying that my partner is not one of my choice, and therefore can only bind me for a *pro rata* of the indebtedness." This doctrine does not rest entirely upon that reason, although with deference to the court we think that would be sufficient, because an obnoxious partner might otherwise buy in and bankrupt the others. But it rests upon the further

[1] Charles v. Eshleman, 5 Colo. 111; Higgins v. Armstrong, 10 Pac. Rep. 332; Skillman v. Lachman, 28 Cal. 198; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751.

[2] Snyder v. Burnham, 77 Mo. 52, 15 M. R. 562.

[3] Meagher v. Reed, 14 Colo. 350, 24 Pac. Rep. 681. See Randall v. Meredith, 76 Tex. 669, 11 S. W. Rep. 170; s. c., 13 S. W. Rep. 576.

[4] Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970.

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ground that their interests in the property are unequal, as a general rule; also, that they are and always have been recognized as a limited special partnership, which neither death, withdrawal nor bankruptcy of a member will dissolve. And this is expected to be so to the extent generally of putting those who deal with them upon inquiry as to their interests, and because they are generally so numerous and usually act more like corporations than as partners, thus putting them upon a different basis and giving them a distinctive niche in the structure of the law. If all were agents, it can readily be seen that the business of the copartnership would seldom, if ever, be properly done, and it would result in such confusion as to defeat the object of their creation. It is better to let them rest, as they have always done, upon peculiar and special grounds, and say that those are agents only who are constituted such; and let the doctrine apply that those who deal with them must, at their peril, inquire into the extent of the authority of the person making the contract, as they must do with reference to corporations. In short, it is better that the general rule of corporations than that of partnerships apply to them, if either is to govern. It is still better to let them repose, as they have securely rested, upon a peculiar foundation of their own.

§ 1505. What does not constitute a mining partnership.— It not infrequently occurs that agreements affecting mining property which do not amount to the formation of a mining partnership, although at first blush they appear to do so, are made between parties. For instance, an agreement whereby defendant was to pay plaintiff "big wages" while employed in procuring for him "a paying mine," and operating the same, and, in case he did secure such a mine, to convey to him "an interest" in the mine, and on his failure to secure a paying mine, to pay him reasonable wages, does not constitute a partnership nor furnish any foundation for specific performance.[1] In Nevada it has been held that one member of a partnership

[1] Berry v. Woodburn, 107 Cal. 504, 40 Pac. Rep. 802. See also *post*, § 1513.

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which has been settled up, which settlement is not impeached, is not entitled to an interest in a mining claim located by another member, under an oral agreement that they should be partners in all such locations, when no trust arises, merely because partnership capital is employed in locating the claim.[1] This case turned upon the statute of frauds of that state, and a finding that the location was not made with partnership funds. Nor is the relationship created under an agreement where one who has mortgaged mining property to secure a debt is to remain in possession and turn over the result of each clean-up to the mortgagee, the latter to apply it to the mining expenses and the payment of the mortgage debt.[2] Neither should it be held to exist where one co-tenant works the property to the exclusion of the others, as in the Idaho case.[3]

§ 1506. The early distinction in England — Not partners in handling product.— The deductions to be drawn from the early cases in England, as also from the observations of the text-writers in relation to mining partnerships, are, that where the purpose of the association was to own leasehold or other interests in the mines themselves, as well as to engage in working their product, there was a mining partnership, but where the business and pursuit of the association was merely the dealing in the product of the mines it was classed as a general partnership.[4] So, in

[1] Craw v. Wilson, 22 Nev. 385, 40 Pac. Rep. 1076.

[2] Chung Kee v. Davidson, 102 Cal. 188, 36 Pac. Rep. 519. But see Hurd v. Tompkins, 30 Pac. Rep. 247.

[3] See *ante*, § 1433.

[4] Bainb. Mines (1st Am. from 3d Lond. ed.), pp. 335, 336, 337, 338, 339, 340, 341; Coll. Mines, ch. 3; Fereday v. Wightwick, 1 Rus. & M. 45; Jefferys v. Smith, 1 Jac. & W. 298, 3 Rus. 158; Crawshay v. Maule, 1 Swanst. Ch. 495; Tredwen v. Bourne, 6 M. & W. 461; Story v. Lord Windsor, 2 Atk. 633; Lawton v. Lawton, 3 Atk. 16; Port v. Turton, 2 Wils. 169; Ex parte Gardner, 1 Rose, 377, 1 Ves. & B. 45; Ex parte Atkinson, 1 M. & G. 300; Parker v. Wells, 1 Brown C. C. 179; s. c., 1 T. R. 34; Ex parte Maginnis, 1 Rose, 84; Fox v. Clifton, 6 Bing. 776; Nockells v. Crosby, 3 B. & C. 814; Browne v. Freeth, 9 B. & C. 632; Vice v. Lady Anson, 7 B. & C. 409; Vice v. Fleming, 1 Y. & J. 227.

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this country, where the form of the agreement is in the nature of a general partnership, both as respects the agency of partners and other essential features, notwithstanding it is the purpose to deal in and operate mines and mining property, it will be classed as a general partnership.[1] But where a mining partnership is formed, and in pursuance thereof the members forming it actually engage in the working and operation of mines, without permitting any of the members to become general agents of the others, and under such circumstances as that the death or withdrawal of a member will not dissolve it, then it can safely be said that a mining partnership is formed.[2]

§ 1507. History — Genesis — The cost-book system.— Mining partnerships clearly had their birth and genesis in the cost-book system as it prevailed in Cornwall and Devon. From the fact that parties were compelled under that system to look to the cost book for all authority, and the resulting hardship and inconvenience necessarily incident, a more enlarged creation between the rights and duties of general corporations and those of a general trading partnership became a necessity, the result of which was a mining partnership, which has gradually grown from its first examination by the courts in the year 1818 to the distinctive niche it occupies in the mining jurisprudence of to-day.[3]

§ 1508. Further as to the cost-book system — Distinguishing characteristics.— Essential, therefore, to a correct understanding of a mining partnership, it will be necessary to examine the distinguishing features of the cost-book system, which were: It could not be composed of more than twenty-five persons; all participated in the arrange-

[1] Kimberly v. Arms, 129 U. S. 512; Bybee v. Hawkett, 12 Fed. Rep. 649.

[2] Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 28 Cal. 569; Fereday v. Wightwick, 1 Rus. & M. 45.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), 343; Coll. Mines, pp. 92, 93, 94; Arundell, Mines, 30; 16 Jur. 22; B. & W. L. C. Mines, 538. See Lindl. Mines, § 796, where he speaks of the origin of mining partnership as occurring in the early period of mining in the West, but admits its similarity to the cost-book system.

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ment; no *delectus personæ;* no authority of agency of members or otherwise except as expressed in the cost book; change of ownership did not affect the enterprise; the interests were generally personal property, and hence the transfers were not controlled by the statute of frauds; the failure to respond to calls generally forfeited the interest.[1]

§ 1509. Same — Mr. Collier's views. — Mr. Collier thus lays down the rule in respect to the cost-book system: "A number of adventurers, who have obtained permission from the owner of the land to work a lode, assemble; they decide on the number of shares into which their capital is to be divided, and the number to be allotted to each; they appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine, and enter into a book, called the cost book, the minutes of their proceedings, which are signed by all present. A license to try for ores for twelve months or some short period is then obtained, followed, if the search be promising, by a sett, that is, a lease of the minerals, or a license to dig, or both, granted by the land-owner to the purser, or to one or two of the adventurers, without any expression of trust on their part for the rest or any other persons, for a term of years, commonly twenty-one, stipulating for the annual payment of some portion of the ore raised. The purser superintends the works, orders the necessary materials, keeps the cost book, in which he enters all the proceeds and disbursements of the mine, and the names of the shareholders, together with the account for and against each, and the transfer of shares whenever they are transferred; he makes calls such as have been agreed to at a general meeting, and convenes those meetings by circular at regular intervals, commonly of two months. These general meetings review the accounts and report of the purser, and pass resolutions, either declaring dividends or authorizing calls, and directing the mode of

[1] Skillman v. Lachman, 23 Cal. 688; Dickerson v. Valpy, 10 B. & C. 198; Ricketts v. Bennett, 4 C. B. 128; Duryea v. Burt, 28 Cal. 569.

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carrying on the mine. It is understood that any adventurer may relinquish his share and with it his liabilities, at least as far as his partners are concerned, by giving notice of relinquishment in writing to the purser, and settling his account with the mine."[1]

§ 1510. Interests forfeitable — Rules of cost book.— It was likewise well settled that the interests of a partner under the cost-book system became forfeited by his failure to pay the calls made by the purser or by the members duly assembled.[2] Both shareholders and the company mining under the cost-book system are bound, and only bound, by the rules of the cost book.[3]

§ 1511. Cost-book company a partnership.— It will thus be seen that cost-book mining possessed all the elements of a mining partnership, with the single exception that the rules of the cost book were substituted for the ordinary rules of law, as enunciated by the courts, to control such transactions.[4] The cost-book system as it then existed, and as it now exists, may be regarded as a species of mining partnership.

§ 1512. Distinctions between mining partnership and co-tenancy.— The question of the existence of a mining partnership, however, may, and often does, depend upon very nice considerations, and is described in one case by

[1] Coll. Mines, 98; Banb. Mines, 159–163; Walker v. Bartlett, 17 C. B. 446; Thomas v. Clark, 18 C. B. 662; Re Bodmin Mines, 23 Beav. 370.

[2] Coll. Mines, pp. 93, 96; Bainb. Mines, pp. 162, 163; Walker v. Bartlet, 17 Com. B. 446; In re The Bodmin United Mines, Re North Hollen Beagle T. & C. M. Co., 36 L. J. (N. S.) Ch. 317, 23 Beav. 370, 26 L. J. Ch. 570; Clark v. Hart, 6 H. L. Cas. 633, 5 Jur. (N. S.) 447.

[3] Thomas v. Hobler, 8 Jur. (N. S.) 125, 3 F. & J. 199; Coll. Mines, pp. 95, 96; B. & W. L. C. Mines, pp. 538, 539; Bainb. Mines, pp. 163, 164; Toll v. Lee, 4 Exch. 230, 18 L. J. (N. S.) 364; Chynowith's Case, Re Wheal United Wood Mining Co., L. R. 15 Ch. 13; Clark v. Hart, *supra*. See Rule v. Jewell, L. R. 18 Ch. 660.

[4] Kittow v. Liskeard Union, L. R. 10 Q. B. 7, 44 L. J. M. C. 23; Peel v. Thomas, 15 C. B. 714; Sedgwich v. Daniel, 27 L. J. (N. S.) Exch. 116, 2 H. & N. 319.

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Lord Eldon as a very difficult question.[1] It is often difficult to distinguish on the one hand between it and a tenancy in common, and on the other, between it and a general partnership. Thus, the adventurers may be only joint tenants or tenants in common of the mining property, the profits of which they combine to enjoy and realize, by consenting to appoint a general system of management. In this situation they will be considered with respect both to themselves and third persons as the owners of the land, working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property. As was said by Mr. Collier: "Mining partnerships are said to possess some features peculiar to themselves which distinguish them from ordinary trading concerns. . . . A question of some nicety sometimes arises whether persons working mines are mere trading partners or mere joint occupiers of land, using the minerals as part of its produce. . . . This question will turn on the consideration whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land."[2]

§ 1513. Further as to what is not a mining partnership.— In the last case cited in the preceding section the supreme court of the United States said: "It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a

[1] Crawshay v. Maule, 1 Swanst. Ch. 523; Coll. Mines, 88; Bainb. Mines (1st Am. from 3d Lond. ed.), 334; Steward v. Blakeway, L. R. 6 Eq. 479; Abel v. Love, 17 Cal. 233; Pico v. Columbet, 12 Cal. 414; Goodenow v. Ewer, 16 Cal. 461; Kahn v. Central Smelting Co., 102 U. S. 641, reversing s. c., 2 Utah, 371.

[2] Coll. Mines, p. 88. See also Fereday v. Wightwick, 1 Rus. & M. 45; Duryea v. Burt, 28 Cal. 569, 577; Skillman v. Lachman, 23 Cal. 203; Kimberly v. Arms, 129 U. S. 512, 530.

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mining partnership than a partnership for the purchase of the products of the farm, and the lands upon which those products are raised, can be called a partnership to farm the land." The facts in this case were that the parties, residents of Ohio and Pennsylvania, entered into a general partnership by written articles for the purpose of "leasing, prospecting, buying, working and operating, and dealing in lead, iron, silver, gold and other minerals, together with the lands on which the same may be located," and pursuant thereto they bought and operated certain properties in the state of Colorado and the territory of Arizona, and the question under consideration was whether one of the partners could lawfully engage in secret independent operations. It was held that he could not lawfully so engage and keep the earnings to himself, distinguishing this case from another case,[1] in that this was a general and that a mining partnership.[2]

§ 1514. Same — Distinction from trading partnership. As pointed out in an early case[3] in the United States supreme court, mining partnerships differ from ordinary commercial partnerships in many respects; one of which is, that the conveyance by one of all or any part of his interest does not accomplish the dissolution of a mining partnership.[4] Nor is it important that this sale be made to any of the other partners, even without the knowledge or consent, or with the knowledge and without the consent, of some others of them.[5] The members of a mining partnership have not the selection of the *personnel* of it.[6] The acts of one

[1] Bissell v. Foss, 114 U. S. 252.

[2] Kimberly v. Arms, 129 U. S. 512, 530. See also Decker v. Howell, 42 Cal. 636.

[3] Kahn v. Smelting Co., 102 U. S. 641.

[4] Skillman v. Lachman, 23 Cal. 203.

[5] Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828, 49 L. R. A. 868; Bissell v. Foss, 114 U. S. 252, quoting from and citing with approval Kahn v. Smelting Co., *supra;* Duryea v. Burt, 28 Cal. 469; Settembre v. Putnam, 30 Cal. 490; Taylor v. Castle, 42 Cal. 367.

[6] *Post,* § 1527 *et seq.*

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mining partner as such do not necessarily bind the others.[1] It is seldom that the interests of all are equal. Therefore, the sale of his interest by one, to whomsoever he chooses, is not only within his power, but it is entirely beyond the power of the others to prevent it. Any other rule would render mining by mining partnerships extremely impracticable. Associations for working mines are usually composed of a greater number of persons than ordinary trading partnerships; and if the death, bankruptcy or sale of his interest by one member would dissolve the partnership and necessitate the winding up of its affairs, it is easy to see what the result would be. As noticed by the United States supreme court,[2] this was recognized at an early day and a different rule made to apply. While, therefore, they are controlled by many of the rules which govern trading partners, others which govern corporations, and still others which govern tenants in common, it is better, as we have attempted to point out, that they be directed by their own special rules as herein gathered up.

§ 1515. How interest may be acquired — Purchaser's liability.— A share in a mining partnership may be acquired without such an instrument of conveyance as is necessary to pass an interest in lands.[3] As, for instance, A. furnishes money or provisions for B. to go out and locate or work mining claims, and B. takes all such claims in his own name; while the legal title thus remains in B., there is no question that a court of equity would decree a portion of this interest

[1] *Post*, § 1527; and see § 1504, *ante*.

[2] Kahn v. Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252.

[3] Coll. Mines, pp. 125, 126, citing Vice v. Lady Anson, 7 B. & C. 409; Dickerson v. Valpy, 10 B. & C. 129; Reynolds v. Bassett, unreported; Fox v. Clifton, 6 Bing. 776; Nockells v. Crosby, 3 B. & C. 814; Browne v. Freeth, 9 B. & C. 632; Tredwen v. Bourne, 6 M. & W. 461; Hawkins v. Bourne, 8 M. & W. 703; Ralph v. Harvey, and Richards v. Harvey, 1 Q. B. 845; Ricketts v. Bennett, 17 L. J. Ch. 17; Hawtayne v. Bourne, 7 M. & W. 595; Dawson v. Morrison, 16 L. J. C. P. 440; Williams v. Atenborough, Turn. & Russ. 73; Winchester v. Knight, 1 P. Wms. 406; Parrott v. Palmer, 3 Myl. & K. 632; Jefferys v. Smith, 1 Jac. & W. 298.

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to be held in trust for A.[1] In other words, while their relationship to the property would not make them partners, their operation of the property, as such, would, even though one of them held the entire legal title. It is true, such an agreement would amount to a "grub-stake" contract, and we will notice the question more fully under that head. But grub-staking is only a species of mining partnership, and it is not out of place to treat it here. It is sometimes regulated by statute that a purchaser of an interest in a mining partnership takes it subject to the liens existing against it at the date of purchase, unless he purchase for a valuable consideration without notice of such liens. And when the partnership is engaged in operations at the date of purchase, he is charged with notice of all liens for moneys due the other members and creditors resulting from such operations. But, of course, any such rule, in the absence of contract, would not relieve the selling partner from liability for debts contracted while he was a partner for which he was otherwise responsible. Each member has a lien after debts are paid on the social property for advances by him on account of the business.[2]

§ 1516. Mining under general partnership.— In some jurisdictions mining operations have been conducted under contracts of general partnership, and under circumstances showing a general rather than special partnership. These cases are easily distinguishable from the special mining partnership cases, and are to be construed as in no way overturning the doctrine of mining partnership, resting, as they do, on different grounds.[3]

[1] See Reed v. Meagher, 14 Colo. 335, 9 L. R. A. 455.

[2] Childers v. Neely, 47 W. Va. 70, 30 S. E. Rep. 828, 49 L. R. A. 868.

[3] Kimberly v. Arms, 129 U. S. 512; Bybee v. Hawkett, 12 Fed. Rep. 649; Mason v. Pewabic M. Co., 133 U. S. 50; Decker v. Howell, 42 Cal. 636; Lawrence v. Robinson, 4 Colo. 567; Duffield v. Brainard, 45 Conn. 424; Levi v. Karrick, 13 Iowa, 344; McAdams v. Hawes, 9 Bush, 15; Godfrey v. White, 43 Mich. 171; Pierce v. Pierce, 55 Mich. 629; Barrett v. McKenzie, 24 Minn. 20; Phillips v. Reeder, 18 N. J. Eq. 95; Boswell v. Green, 25 N. J. Law, 390; Mosier v. Trumpbour, 5 Wend.

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§ 1517. Mere joint ownership not sufficient — Must work mines.— So it would seem that mere joint ownership of mining claims does not constitute a mining partnership; nor will the performance of mere annual labor, made necessary by law, create the relationship; they must actually engage in the development and operation of the mine in the ordinary course of mining.[1]

§ 1518. Liability of members.— It is well settled that members of the cost-book company are liable to contribution until their stock is actually transferred on the cost book and all liabilities to that date paid;[2] another close analogy to the law of mining partnership, and a further proof that the cost-book system furnishes the basis of the law of mining partnership.

274; Carter v. Birringer, 45 N. Y. 545; Jones v. O'Farrell, 1 Nev. 354; Hixon v. Pixley, 15 Nev. 475; Reid v. Barnhart, 1 Jones Eq. 142; Rhea v. Van Noy, 1 Jones Eq. 282; Rhea v. Totham, 1 id. 290; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Farmer Ins. Co. v. Ross, 29 Ohio St. 429; Eagle v. Bucher, 6 Ohio St. 295; Breading v. Boggs, 20 Pa. St. 33; Patterson v. Silliman, 28 Pa. St. 304; Grubb's Appeal, 66 Pa. St. 117; McKnight v. Ratcliff, 44 Pa. St. 156; Slemmer's Appeal, 68 Pa. St. 168; Babcock v. Stewart, id. 179; Kirk v. Hartman, 63 Pa. St. 67; Hedge's & Horn's Appeal, id. 273; Douty v. Bird, 60 Pa. St. 48; Hogeboom v. Gibbs, 88 Pa. St. 235; West Hickory M. Ass'n v. Reed, 80 Pa. St. 38; Frack v. Blackiston, 83 Pa. St. 474; Fletcher v. Hawkins, 2 R. I. 330; Flemp v. Eureka Marble Co., 53 Vt. 669; Forrer v. Forrer, 29 Grat. 134.

[1] Prince v. Lamb (Cal., 1900), 60 Pac. Rep. 689; Vietti v. Nesbit, 23 Nev. 390, 41 Pac. Rep. 151; Quackenbush v. Sawyer, 54 Cal. 439; Dwinell v. Stone, 30 Me. 34; Chung Kee v. Davidson, 102 Cal. 188, 36 Pac. Rep. 519; Berry v. Woodburn, 107 Cal. 504, 40 Pac. Rep. 802; Stevens v. McKibbin, 68 Fed. Rep. 406; Horton v. New Pass G. & S. M. Co., 21 Nev. 184, 27 Pac. Rep. 376; Hudepohl v. Liberty Hill Cons. M. & W. Co., 80 Cal. 533, 22 Pac. Rep. 339; Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970; Butler v. Hinckley, 17 Colo. 523, 36 Pac. Rep. 250.

[2] Re North Hollen Beagle T. & C. M. Co., 36 L. J. (N. S.) Ch. 317; Re Bodmin United Mines, 26 L. J. Ch. 570; Northey v. Johnson, 1 L. T. 104; Peel v. Thomas, 15 C. B. 714; Johnson v. Goslett, 27 L. J. C. P. (N. S.) 122; Fenn's Case, 4 De G. M. & G. 285; Re Welsh Potosi, 27 L. J. B. K. (N. S.) 1, 2 De G. & J. 10, 69; Curling v. Flight, 2 Phil. 618.

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Article B.

Distinction from General Partnership.

§ 1526. Distinction — No agency.
1527. Same — No *delectus personæ*.
1528. Differences enumerated — Authority of member as agent.
1529. Same — Power of agent must be established.
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1531. Yale's review of the subject.
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1534. Limitations — Majority in interest controls.
1535. Authority of the managing agent.
1536. Acts must be authorized — Custom.
1537. Agency confined within strict limits — Greatest emergency does not justify departure from strict rule.
1538. Agency by express authority or by adoption of fruits.
1539. Power to borrow money.
1540. Not a trading partnership.
1541. Management of property — Compensation of manager.

§ 1526. Distinction — No agency.— Mining partnerships, as we have seen, are said to possess some features, peculiar to themselves, which distinguish them from ordinary trading concerns. Difficult questions of both law and fact approaching very close to the border line sometimes arise as to whether persons working mines are trading partners or mere joint occupiers of land, using mines as a part of its produce. These questions will often turn on the consideration as to whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the working of the mines.[1]

Another peculiar feature is that, as a general rule, the persons comprising the partnership are not agents for it, in the sense that they are agents under the ordinary rules relating to partnerships, and, in the absence of express authority, one partner cannot bind his copartners beyond the most ordinary necessities of the case, and generally not at all.[2] As said by the California court: "One mining part-

[1] Collier, Mines, p. 88; Duryea v. Burt, 28 Cal. 569.

[2] Kahn v. Smelting Co., 102 U. S. 641; Duryea v. Burt, *supra*.

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ner has not the power to bind his associates by engagements with other persons to the extent that an individual partner in an ordinary trading concern is competent to bind the firm of which he is a member. The reason for the distinction is, because a mining partnership is subject to changes in its membership, as already indicated; is not founded on the *delectus personæ*, while the ordinary partnership is; . . . a difference which limits the powers of the partners, for reasons which are obvious, to the performance of such acts in the name of the partnership as may be necessary to the carrying on of its business, or which are usual in like concerns."[1]

§ 1527. Same — No delectus personæ. — The right of selection of persons is so essential to an ordinary partnership that the dying or withdrawing of one person dissolves it, and when one partner withdraws, even with the consent of all the others, the result is the same — the partnership is dissolved and a new partnership, temporary it may be, is formed. This has no application in mining partnerships, where any number of partners may sell or otherwise dispose of their interests without effecting a dissolution, as we have seen.[2] This question was ably discussed by Justice Field in the United States supreme court.[3]

§ 1528. Differences enumerated — Authority of member as agent. — There are, as we have attempted to point out, at least three essential differences between a mining and an ordinary trading partnership, viz.: *a.* There is no *delectus*

[1] Skillman v. Lachman, 23 Cal. 198. See also Duryea v. Burt, *supra;* Ricketts v. Bennett, 4 C. B. 688; Dickerson v. Valpy, 10 B. & C. 128.

[2] *Ante*, § 1514.

[3] Kahn v. Central Smelting Co., 102 U. S. 641; s. c., Kahn v. Old Telegraph M. Co., 2 Utah, 174, although the mining partnership question was not passed upon there. See also Bissell v. Foss, 114 U. S. 252; Skillman v. Lachman, 23 Cal. 198; Harris v. Lloyd, 11 Mont. 390, 28 Pac. Rep. 736: Bradley v. Harkness, 26 Cal. 69; Settembre v. Putnam, 30 Cal. 490; Duryea v. Burt, 28 Cal. 569, 579; Taylor v. Castle, 42 Cal. 367; Dougherty v. Crary, 30 Cal. 291; Abel v. Love, 17 Cal. 233: Nolan v. Lovelock, 1 Mont. 227: Decker v. Howell, 42 Cal. 636; Jones v. Clark, 42 Cal. 180.

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personarum.[1] *b*. Death or sale of an interest of one of the partners does not dissolve it.[2] *c*. There is no implied authority in any of the partners to bind any of the others.[3]

The doctrine of mining partnerships, in respect to this point, as followed by what seems to be the best considered cases, is thus stated by Mr. Collier: "Again, it would have been somewhat hard upon the mining adventurer if each of his numerous associates whom he had not the means of selecting had power to bind him by engagements with the public, as extensive as those of partners in ordinary trading concerns. Accordingly mining partnerships were early recognized as differing from ordinary trading partnerships in not being founded on the *delectus personæ*, from which principle the rights and obligations of ordinary trading partners are mainly derived. It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his copartners,— and that upon his death or bankruptcy, the law, instead of dissolving the partnership, would transfer it to his executors or assignees,— and the powers of partners to bind each other by engagements entered into with non-partners were restricted."[4] And this must be true from the very nature of things. A glance at the *personnel* of the average western mining partnership ought to satisfy the most skeptical that the general rule of partnership agency should not apply. These partnerships are usually composed of one or more prospectors, who attend to the details of locating and working of the mining claims, and who are "backed" by one or more of the leading citizens of the neighboring town, not infrequently the banker, or one of the leading merchants. To say that it was ever the intention of either of these people that the prospectors should have power to bind the others for anything beyond the barest necessities of the mining

[1] *Ante*, § 1527.
[2] *Ante*, §§ 1503, 1514, 1527.
[3] *Ante*, §§ 1504, 1526.
[4] Coll. Mines, 90. See also Yale, Mines, 224.

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venture, if at all, would be absurd. As said by Bainbridge, they "cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership."[1] Of course, where the mining is done by a general partnership,[2] merely as an incident to its other business, the rights and powers of the members are measured by the rules governing such partnerships. But where the sole purpose of the partnership is to work the mine, and the parties are not partners for any other purpose, each is liable only for his own engagements.[3]

§ 1529. Same — Power of agent must be established. — The powers of managers and members of mining partnerships are stated by the supreme court of Colorado to be limited to the performance of such acts, in the name of the partnership, as may be necessary to the transaction of its business, or usual in like concerns.[4] In a later case in that state[5] this power was held to extend to the employment of miners to work the property. And this must be true, because the employment of a miner is one of the incidents of the business. But because, beyond the barest incidents of necessity, one member of the mining partnership has not the authority, unless it is expressly given, to bind the firm, there can be no definite rule of law laid down as to the extent of that authority. Each case must rest upon its own peculiar facts; and unless it is made clearly to appear that the person whose acts are sought to bind the firm had express authority to do so, the firm should not be held liable,[6] and the burden of establishing such authority would be on the person asserting it.[7]

[1] Bainb. Mines, 336.

[2] *Ante*, § 1516.

[3] Bainb. Mines, 341; Skillman v. Lachman, 23 Cal. 198, 203. See also Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Congdon v. Olds, 18 Mont. 487, 46 Pac. Rep. 261; Decker v. Howell, 42 Cal. 636, 641.

[4] Charles v. Eshleman, 5 Colo. 107, 112, citing with approval Skillman v. Lachman, 23 Cal. 200; Duryea v. Burt, 28 Cal. 569. See Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 824.

[5] Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. Rep. 735.

[6] Gudge v. Brashwell, 13 Bush, 67.

[7] Id. See also Dickenson v. Valpy, 10 B. & C. 126; Levy v. Pine, 41 E.

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§ 1530. Partner acting as agent must not violate instructions.— Where the managing member of a mining partnership, in disregard of positive instructions from his copartners, borrows money solely upon his own credit and without their knowledge, it is error, in an action against the partnership for the money, to instruct that the copartners are liable "if the act was necessary for carrying on the business of the partnership."[1] This decision in effect overrules the former decision of the same court in an action between the same parties, wherein it is held that one member of a mining partnership may bind the others for necessaries purchased by him while working the mine.[2] The last expression of the court seems the correct one, where the question of "whether usual in the ordinary business of the partnership," rather than the vague question of "unusual because necessary," is made the test.[3]

§ 1531. Yale's review of the subject.— Mr. Yale quotes with approval from Collyer,[4] as follows: "In case of ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting bills is necessary for the purpose of carrying on a trading partnership. But as this is not generally necessary for the purpose of carrying on the business of a mining company, the law will imply no authority in the directors of a company to bind the shareholders by bills of exchange; and, *a fortiori*, the agent of a mining company has no implied authority to bind the shareholders in the name of the company."[5]

Further on, on the same page, Mr. Yale says: "The decisions upon the extent of the liabilities of mining partners

C. L. 249; Smith v. Sloan, 37 Wis. 289.

[1] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

[2] Randall v. Meredith (Tex.), 11 S. W. Rep. 170.

[3] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576; Bates, Partn., § 320.

[4] Collyer, Partn., § 663.

[5] Yale, Mines, p. 224.

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may be presented in a very short summary. The cases are reviewed under the general principle of restricted liability.[1] There is no conflict in these. It may be stated:

"1st. That no liability can be created from the implied authority of one partner by the execution of a note or bill of exchange, no matter how pressing the occasion or necessity for the use of the money in the working of the mine may be.[2]

"2d. That one mining partner has not the authority to pledge the credit of the concern for money borrowed by an other for the purpose of the mine, although such person be the resident managing owner;[3] and although the necessity be ever so pressing in order to obtain money to pay the arrears of wages for working the mine, due to laborers who are suing the company.[4]

"3d. That the law implies a liability on the part of all the partners, in the absence of proof of a more limited liability, to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or useful in the management of the mines."[5]

§ 1532. Further as to powers, rights and duties of mining partners.— Since, as seen by the preceding sections, the power to draw bills of exchange is not one of the necessary incidents to the business, it must follow that the authority to execute a promissory note by one partner in the

[1] Ricketts v. Bennett, 4 C. P. 686, 50 Eng. Com. Law Rep. 695, decided in 1847.

[2] Dickerson v. Valpy, 10 Barn. & C. 41. See also Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 28 Cal. 569; Charles v. Eshleman, 5 Colo. 107; Chase v. Savage M. Co., 2 Nev. 9; Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Congdon v. Olds, 18 Mont. 487, 46 Pac. Rep. 261.

[3] Ricketts v. Bennett, 4 C. P. 686, 56 Eng. Com. Law Rep. 695.

[4] Hawtayne v. Bourne, 7 M. & W. 595.

[5] Tredwen v. Bourne, 6 M. & W. 461; Hawkins v. Bourne, 8 M. & W. 703; Peel v. Thomas, 15 C. P. 714, 24 L. J. C. P. 86. See also Randall v. Meredith (Tex.), 11 S. W. Rep. 170; Nolan v. Lovelock, 1 Mont. 224; Roberts v. Eberhardt, 1 Kay, 148.

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name of the company is not one of the incidents. And where such a note is given, the person relying upon it must prove that its maker had authority to execute for the partnership.[1] So, also, the authority of one partner to convey away the partnership property only extends to his own interest, and this notwithstanding the title to the property stands entirely in the name of such party.[2]

Again, where losses result to the partnership from neglect of duty or bad faith of a partner, or from breach of duty or a partnership agreement, or improper use of the property for a purpose foreign to the objects of the partnership, the party guilty of such misuse, and causing such loss, will be liable therefor, in an accounting, to the partnership.[3]

In the absence of statute regulating the liability of mining partners, the rule must be that the profits and losses are shared by each in proportion to his interest.[4] This upon the general and controlling principle of special partnership. Of course, where there is a statute upon either subject, it is controlling.

§ 1533. The supposed contradiction.— In a late case in California, the court, as already noticed,[5] in holding that a mining superintendent has the right to expend partnership funds for necessary supplies for the mine, took occasion to indulge certain dictum, which has been thought to enunciate a departure from earlier decisions as above indicated. We have noticed that decision at length, and will therefore refrain from further comment or repetition other than to say that California, with a confidence in the stability of certain

[1] Skillman v. Lachman, 23 Cal. 198.

[2] Meagher v. Reed, 14 Colo. 335, 9 L. R. A. 455. See also Murley v. Ennis, 2 Colo. 300.

[3] Childers v. Neely, 47 W. Va. 70, 49 L. R. A. 468.

[4] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576; Settembre v. Putnam, 30 Cal. 490.

[5] *Ante*, § 1504; Stuart v. Adams, 89 Cal. 367, 24 Pac. Rep. 970.

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axioms, has enacted a civil code in which mining partnership, with attendant rights and duties, is elaborately considered. This decision finds a misty justification in the code, but the earlier decisions, so far as it can be said that this disagrees with them, are more nearly correct, and, as we think, state the true rule governing mining partnership;[1] and the rule is otherwise settled in that state that one partner without authority cannot bind the others.

§ 1534. Limitations — Majority in interest controls.— The rule that one member of a mining partnership has authority to bind its credit, even for necessaries incident to the working of the mine,[2] does not apply where there is a disagreement between the members as to the manner of carrying on operations. In such case, in the absence of statute, those holding a majority in interest have the controlling voice.[3] But of course this voice only extends to the doing of things necessary and proper for carrying on the enterprise for the benefit of all concerned.[4] Here again we find a close analogy between mining partnership and corporations, the government of which is, or may always be, in the hand of the owners of a majority in interest. This rule is statutory in California, Idaho, Montana and Nevada.[5]

[1] Skillman v. Lachman, 23 Cal. 198; Patterson v. Keystone M. Co., 30 Cal. 360; Page v. Summers, 70 Cal. 121, 12 Pac. Rep. 120; Nisbet v. Nash, 52 Cal. 540; Miller v. Butterfield, 79 Cal. 62, 21 Pac. Rep. 543.

[2] *Ante*, § 1532. See also Jones v. Clark, 42 Cal. 180, 191; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Charles v. Eshleman, 5 Colo. 107; Burgan v. Lyell, 2 Mich. 102; Nolan v. Lovelock, 1 Mont. 224; Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576; Higgins v. Armstrong, 9 Colo. 338, 10 Pac. Rep. 232; Meagher v. Reed, 14 Colo. 335, 24 Pac. Rep. 681.

[3] Dougherty v. Crary, 30 Cal. 291, 301; Taylor v. Castle, 42 Cal. 367; Nolan v. Lovelock, 1 Mont. 224; Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 824.

[4] Childers v. Neely, *supra;* Dougherty v. Crary, *supra.*

[5] Montana Rev. Code of 1895, § 3359; Cal. Civ. Code, § 2520; Civ. Code Idaho, § 2774 *et seq.;* Nev. Sess. Laws, 1899, p. 93. See also Hawkins v. Spokane H. M. Co., 2 Idaho, 970, 28 Pac. Rep. 433; s. c. (second appeal), 33 Pac. Rep. 40.

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§ 1535. Authority of the managing agent.—It seems well settled that one of the partners or any other person may be designated as the managing agent, who alone is authorized to bind the partnership, and in this rests one of the distinctions between a mining and a general partnership. The authority of the managing agent may be either express or implied. It is expressed, and limited within the authority expressed, when those dealing with the partnership have actual notice or knowledge of the extent and nature of the authority; in which case, for obvious reasons, the liability of the partnership is limited to the express authority, and confined within the environment thus placed about it.[1] It is implied in all other cases, from the nature and circumstances of the business, and the necessity of carrying on the business of the partnership, for the purpose of attaining the object of its creation, and is restricted within the narrowest limits possible for that purpose, or within the generally recognized limits of an ordinary mining superintendent.[2]

§ 1536. Acts must be authorized—Custom.—Any general or prevailing custom affecting the liability of the mining partnership for the acts of agents must be restricted within very narrow limits.[3] And it may be stated as the general rule that the authority must be created in some one of the ways sufficiently potent to create an ordinary agency or it does not exist.[4] The agency of the managing partner must, of course,

[1] Skillman v. Lachman, 23 Cal. 199; Bissell v. Foss, 114 U. S. 260; Kahn v. Central Smelting Co., 102 U. S. 641; Stuart v. Adams, 89 Cal. 367; Brundage v. Adams, 41 Cal. 619; Clark v. Ritter, 59 Cal. 669; Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

[2] Randall v. Meredith, *supra;* Brundage v. Adams, *supra;* Skillman v. Lachman, *supra.* See also Miller v. Butterfield, 79 Cal. 62; Dougherty v. Crary, 80 Cal. 290; *post*, Mining Superintendent, ch. IV, this Part.

[3] *Ante*, § 1529; Jones v. Clark, 42 Cal. 180, 192; Charles v. Eshleman, 5 Colo. 107; Bainb. Mines (1st Am. from 3d Lon. ed.), pp. 376, 377; Thicknesse v. Bromilow, 2 Cr. & J. 425.

[4] Chase v. Savage M. Co., 2 Nev. 9; Mears v. James, id. 342; Jones v. O'Ferrell, 1 id. 354; Higgins v.

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be established in the same way that agencies generally are established — either by direct proof of the agency, by an acceptance of the fruits without protest or objection, or by such a holding out as to create an estoppel.[1] And if a custom is relied upon, either in respect of the appointment of the agent, or the nature, quality and extent of his authority, it must be strictly construed, and not extended beyond the narrowest limits essential to the operation of the business.[2]

§ 1537. Agency confined within strict limits — Greatest emergency does not justify departure from strict rule. — If we shall preserve the time-honored distinction which has characterized the dividing line between commercial and mining partnerships, it will be necessary to resist encroachment upon that line at every step; and there is no reason in saying that these partnerships cannot be controlled by their own guiding principles the same as any other branch of the law, and the greatest extent to which the authority of one member to bind the others should be recognized, is for the purchase of such supplies or the employment of such assistance as is absolutely necessary. Beyond this the authority should never be presumed. Ordinarily the only question to be determined is whether the proof shows that the authority exercised by the agent is necessary to the carrying on of the concern, or usual in similar concerns.[3] In this connection

Armstrong, 9 Colo. 47, 10 Pac. Rep. 232; Skillman v. Lachman, 23 Cal. 198; Taylor v. Castle, 42 Cal. 367; Washburn v. Alden, 5 Cal. 463; Jones v. Clark, 42 Cal. 180.

[1] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576; *ante*, § 1535.

[2] See note 3, p. 1147, *supra*. See also *ante*, § 1535; *post*, ch. IV, this Part.

[3] Meagher v. Reed, 14 Colo. 335, 24 Pac. Rep. 681, quoting from Coll. Mines, 125, and citing Crawshay v. Maule, 1 Swanst. 495; Ferreday v. Wightwick, 1 Rus. & M. 45; Williams v. Attenborough, 1 Turn. & R. 70; Dickenson v. Valpy, 10 Barn. & C. 128; Colly. Partn., §§ 801, 808; 1 Bates, Partn., § 163; Charles v. Eshleman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; Skillman v. Lachman, 23 Cal. 199; Duryea v. Burt, 28 Cal. 569; Kahn v. Central Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252, 260; Lamar v. Hale, 79 Va. 147. See also Ricketts v. Bennett, 4 C. B. 686.

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it must be borne in mind that the credit is generally extended to the agent or manager personally, often without any knowledge that the person afterwards sought to be charged has any interest whatever in the business. In such case, the credit not having been extended on the strength of any promise of his, he should not be held liable. This feature is especially noticeable in the Texas case.[1]

§ 1538. Agency by express authority or by adoption of fruits.— Following these principles, then, to their legitimate conclusion, the agency of a mining partnership can only be created so as to bind all the members by direct authority, at a meeting or after consultation with all the members, where all may debate and vote, or give their opinion, on the question, and by a majority as above specified, or by the voluntary adoption of the fruits of the questionable act, or a holding out so as to work estoppel. The doctrine is thus stated by Mr. Lindley: "As in the case of general partnership, the minority must be consulted. Any other course of proceeding on the part of the majority is not in good faith."[2]

In a Texas case, which we noted at some length in a preceding section,[3] T. was the partner operating the mine, and was limited by express instructions to a certain amount; M. loaned him money to continue the mining operations, but there was some dispute as to what M. knew, if anything, as to the special instructions to T. M. sued T., who suggested the bringing in of his other partners, which was accordingly done, and they defended upon the ground that T. exceeded his authority and went beyond his express and positive instructions. In denying to T. the authority to borrow money, the court uses these words: "If a partner be not given express power to borrow money, and the busi-

[1] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

[2] Lindl. Mines, 800, citing Lindl. Part., p. 600. See also Dougherty v. Creary, 30 Cal. 291; Hawkins v. Spokane H. M. Co., 33 Pac. Rep. 40.

[3] *Ante*, § 1530.

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ness or course of business of the firm or like firms be not such that therefrom such a power may be implied, then there is no reason for holding a firm bound for a loan made to and on the sole credit of one partner, simply because he may have used the money for a partnership purpose."[1]

§ 1539. Power to borrow money.— From the position of the Texas court as stated in the last preceding section, it cannot be gainsaid, indeed it would seem plain, that the agent, the operating partner, has not the implied power to borrow money on the credit of the firm. In that case the authorities were carefully collected, and the consensus of opinion stated in the following words: "It has been generally held that mining partnerships are non-trading partnerships, and the individual members of the firm without power to borrow money on the credit of the firm, unless the power be given otherwise than by implication from the ordinary nature of the business."[2]

§ 1540. Not a trading partnership.— In the last case in the preceding section the court distinguishes between a mining and trading partnership, quoting from a leading authority in the following words: "A mining partnership is a non-trading partnership, and its members are limited to expenditures necessary and usual in the particular business."[3]

§ 1541. Management of property — Compensation of manager.— It must be apparent that the management of a

[1] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

[2] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576, citing (which see) Bates, Partn., §§ 329, 371; Lindl. Partn. 266–270; Colly. Partn. 658, 686, note 2; Pars. Partn. 108, 218 and note; Story, Partn., § 126; 1 Story, Cont. 279; Daniel, Neg. Inst., §§ 357–359; Childers v. Neely (W. Va.), 34 S. E. Rep. 828.

[3] Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828. See also Bates, Partn. 329; Waldron v. Hughes, 44 W. Va. 126, 29 S. E. Rep. 505; Judge v. Braswell, 13 Bush, 67; McConnell v. Denver, 35 Cal. 365; Pooley v. Whitmore, 27 Am. Rep. 735; Deardorf v. Thatcher, 78 Mo. 128; Pease v. Cole, 53 Conn. 53, 22 Atl. Rep. 681.

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partnership must be committed to some person. In this respect it is similar to a corporation. When once committed, the manager must be free from irregular interference. Lord Eldon illustrated this truth as follows: "In my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way? Where there are part owners of a mine, and they cannot by contract agree to appoint a manager, this court will manage it for them."[1] As a general rule, the managing partner is not entitled, in the absence of a special agreement, to compensation.[2]

Article C.

Distinctions from Tenancy in Common.

§ 1545. General distinctions from tenancy in common.
1546. When parties treated as partners.
1547. Rule where tenants in common unite to work mine — May sell to each other — No right of pre-emption.
1548. The rule as to ditch associations.
1549. Partners in the extraction of ore.
1550. Part of common law.

§ 1545. General distinctions from tenancy in common. It will thus be seen that tenants in common are not necessarily partners, nor does the mere doing of assessment work make them such. The distinction, and the only one material here, arises when they unite in operating beyond mere assessment work, instead of operating separately. The supreme court of Colorado says: "To the extent of their interest in the property they are tenants in common, and in the work-

[1] Jeffrey v. Smith, 1 J. & W. 298, followed in Roberts v. Eberhardt, 1 Kay, 148. See also Walters v. Taylor, 15 Ves. 10; Denys v. Shuckburg, 4 Y. & E. 42.

[2] Godfrey v. White, 43 Mich. 171. See Levy v. Carrack, 13 Iowa, 158.

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ing of the mine they are to be considered as partners."[1] But a dissenting tenant in common is not a partner in working the mine when operated by others against his wish.[2]

§ 1546. When parties treated as partners.— Here, as in all other branches of the law, courts look to the actions of the parties, rather than the name they give themselves, in determining their rights and duties. Thus, where the parties designate themselves a corporation, but fail to properly file their articles and otherwise comply with the law, they will not be recognized as a corporation, but will be held as partners.[3] In the California case the facts showed the mining property to have been worked by the owners as an unincorporated company, which they styled the Hibernia Mining Company. The principal question for determination, it seems, was whether certain of the members had forfeited their interest. Therefore the court, while holding that there was no corporation, expressed no further opinion on that point. But it must be apparent that the parties were mining partners, pure and simple.

§ 1547. Rule where tenants in common unite to work mine — May sell to each other — No right of pre-emption. Where tenants in common of a mine unite for the purpose of working it, each owner is entirely free to act, touching his interest in the mine, as he may see fit. There is no right of pre-emption of the interest of a retiring partner. Each member has power to dispose of his interest in the mine to whomsoever he wishes, and is free to deal with his

[1] Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212, citing Dougherty v. Creary, 30 Cal. 300; Duryea v. Burt, 28 Cal. 569; Skillman v. Lachman, 23 Cal. 200. See also Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. Rep. 735; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. Rep. 232; Anaconda Copper M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. Rep. 924.

[2] First Nat. Bank v. G. V. B. M. Co., 89 Fed. Rep. 449.

[3] Hill v. Beach, 12 N. J. Eq. 31; Abbott v. Omaha S. Co., 4 Neb. 416. See also New York Iron Mine v. First Nat. Bank, 39 Mich. 644; Wiseman v. McNulty, 25 Cal. 230.

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associates or with a stranger in regard to such interest; and either owner may buy from his associates and thus enlarge his interest without reference to the partnership relation.[1]

§ 1548. The rule as to ditch associations.— In the early history of California it was customary for several persons to combine their efforts for the purpose of constructing water ditches, the water from which they sold to placer miners. In determining the rights of these parties they were held to be tenants in common.[2] And this must be the true rule, since they were not the owners of a mine engaged in operating it, requisite to constitute them mining partners; and the recognized right of any of them to sell his interest without working a dissolution destroyed one of the essential elements of a general partnership. These associations have now ceased to exist, however, and any extended discussion of the question could serve no useful purpose, even if it were proper in a work of this kind.

§ 1549. Partners in the extraction of ore.— A contract providing that one party should have a certain undivided interest in all ores extracted from certain mines, and should bear a proportionate share of the expense of extracting the same, the other parties to have remaining interest in the ore, and to bear the balance of the expense, and also that the first parties should furnish a mill for concentrating the ore, the expense of concentrating and rental of the mill to be divided among the parties, renders them partners in the extraction of the ore,[3] but not mining partners.

§ 1550. Part of common law.— Thus, the law governing mining partnerships is not only a part of the common law of mining, but also of the general common law. The fol-

[1] First Nat. Bank v. Bissell, 2 McCrary, 73; s. c., 4 Fed. Rep. 694; s. c., Bissell v. Foss, 114 U. S. 252; Kahn v. Central Smelting Co., 102 U. S. 641; Kimberly v. Arms, 129 U. S. 512. See also Harris v. Lloyd, 11 Mont. 390. 28 Pac. Rep. 736.

[2] Bradley v. Harkness, 26 Cal. 69; McConnell v. Denver, 35 Cal. 365.

[3] Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. Rep. 664.

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lowing doctrine was laid down in a dissenting opinion by Mr. Justice Boreman, in a Utah case,[1] and was afterwards upheld as law by the supreme court of the United States in another branch of the same litigation:[2] "So we find that mining partnerships did not have their birth upon this western coast, but were known and recognized as a necessity in other lands long before California even was known as a mining country. With the increase of mining in California, as elsewhere, these partnerships have grown up and become, as it were, a part of the common law. The courts of California, following the English rule, recognized them as a necessity, and the legislature of that state in its wisdom has not seen proper, after a trial of the system for nearly thirty years, to do away with them. . . . Miners are accustomed to them, and great business interests have been carried on under them. At this date, therefore, after years of acquiescence by the people generally, it is the duty of the courts to uphold the system and not unsettle mining interests by changing the rule. If that which has become a second nature to mining enterprises had best be modified or abrogated altogether, let the appeal be made to the legislative authority to do the work, making the proper savings of present acquired rights and interests. . . ."[3]

Article D.

How Created and How Established.

§ 1555. How partnership may be created and established — In writing and by parol.
1556. By act of the parties.
1557. When existence question of law and fact.

[1] Kahn v. Old Telegraph M. Co., 2 Utah, 174, 217.
[2] Kahn v. Central Smelting Co., 102 U. S. 641.
[3] Citing Blanchard & Weeks, Lead. Min. Cas. 561, 566; Nolan v. Lovelock, 1 Mont. 224; Duryea v. Burt, 28 Cal. 569; Skillman v. Lachman, 23 Cal. 198; Dougherty v. Creary, 30 Cal. 290; Settembre v. Putnam, 30 Cal. 490; Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188, 203; Blanchard & Weeks, 129, 130; Coll. Mines, 95.

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§ 1555. How partnership may be created and established — In writing and by parol.— It may be stated as a general rule that a partnership itself may be created either in writing or by parol, and that parol evidence is sufficient to establish it.[1] Since the contract itself may be made by the verbal agreement of the parties, it may be proved the same as any other fact.[2] But, of course, the party charged with the burden of proving partnership, like the person having the burden in any other case, must establish it by clear and competent proof.[3] There is one case which seems to announce a somewhat different rule. The supreme court of Nevada, ignoring the partnership contract entirely, and the equitable principle, taking a partly executed parol contract out of the statute of frauds, refused to recognize a mining partnership not established by writing, upon the ground that it was contrary to the statute of frauds of that state, which prohibited the acquisition of an interest in mines by any contract not in writing.[4]

§ 1556. By act of the parties.— Says Mr. Bainbridge: "The other mode of creating a partnership is by just presumption from the acts of the parties. Thus, a communion or participation of profits; a person suffering the use of his name in a business, or admitting any property to be the joint property of himself and another person; the attendance at partnership meetings; the general admission or representation of being a partner, or any voluntary act which may

[1] Perkins v. Peterson, 2 Colo. App. 242, 29 Pac. Rep. 1135; Mayhew v. Burk (Idaho), 29 Pac. Rep. 106; Welland v. Huber, 8 Nev. 203. This case is not noticed in the later case. Craw v. Wilson, *infra*. See also Settembre v. Putnam, 30 Cal. 490; Jones v. Clark, 42 Cal. 180.

[2] Murley v. Ennis, 2 Colo. 300; Hirbour v. Reading, 3 Mont. 13; Snyder v. Burnham, 77 Mo. 52, 15 M. R. 562; Southmayd v. Southmayd, 4 Mont. 100; Duryea v. Burt, 28 Cal. 569; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. Rep. 803; Lawrence v. Robinson, 4 Colo. 567; Meagher v. Reed, 14 Colo. 335, 24 Pac. Rep. 681.

[3] Mayhew v. Burk, *supra*. See Ranahan v. Gibbons (Oreg.), 62 Pac. Rep. 778.

[4] Craw v. Wilson, 22 Nev. 385, 40 Pac. Rep. 1076.

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show a joint interest in the object of speculation, have all been held sufficient to constitute a partnership with respect to third persons."[1] In several states there is express statutory provision that no express agreement to become partners is necessary.[2] And even in those jurisdictions where there is no statute on the subject the best authority is to the effect that no agreement is necessary; a mere indefinite understanding that they will expend their time and skill and pay their share of the expenses being held sufficient.[3]

§ 1557. When existence question of law and fact.— From which it must necessarily follow that the acts necessary to constitute a mining partnership are matters to be determined by the court. But the existence of those facts in the particular case is a question of fact.[4] In other words, no agreement to become partners being necessary, it is for the courts to say what facts, if proved, are sufficient to create such an organization; after which the existence or non-existence of those facts is determined the same as in any other case. The Colorado court also holds that the same strictness of proof is not required of a plaintiff to charge

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 347, citing Smith v. Keyes, 4 Beav. 503; Waugh v. Carver, 2 H. Black. 285; Bird v. Aston, 6 Bing. 788; Lawler v. Kershaw, 1 Mood. & M. 93; Shep. Touch. 71; Guidon v. Robson, 2 Campb. 802; Young v. Axtell, 2 H. Black. 242; Spencer v. Billing, 3 Campb. 310; Goode v. Harrison, 5 B. & Ald. 150; Maudsley v. Le Blanc, 2 Car. & P. 409; Braithwait v. Schofield, 9 Barn. & Cresw. 401; Harvey v. King, id. 356; Vice v. Lady Anson, 7 B. & C. 409, 1 M. & R. 113, 3 C. & P. 19; Dickinson v. Valpy, 10 B. & C. 128, 5 M. & R. 126. See also Duryea v. Burt, 28 Cal. 569; Jones v. Clark, 42 Cal. 180; McConnell v. Denver, 35 Cal. 365; Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880; Slater v. Haas, 15 Colo. 574, 25 Pac. Rep. 1039; Manville v. Parks, 7 Colo. 128; Charles v. Eshleman, 5 Colo. 107, 111.

[2] See statutes in Appendix B.

[3] Besides the authorities in note 1, *supra*, see especially Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828, 49 L. R. A. 468.

[4] Hurd v. Tompkins, 17 Colo. 294, 30 Pac. Rep. 247, citing Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212; 2 Greenl. Ev. (13th ed.) 483; Dwinell v. Stone, 30 Me. 384; Everitt v. Chapman, 6 Conn. 347.

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the defendants as partners as would be necessary if the suit had been instituted by instead of against the firm.[1] But as between themselves, of course, each is bound by the agreement he makes, the same as in any other contract.[2]

Article E.

Rights and Duties Inter Sese.

§ 1565. Rights, obligations and duties of mining partners *inter sese* — Fair dealing.
1566. Skill bargained for — When representatives not entitled to portion.
1567. General rule — Representatives of deceased partner entitled to full share of remainder.

§ 1565. Rights, obligations and duties of mining partners inter sese — Fair dealing.— While perhaps the rule of *uberrima fides* may not be so rigidly enforced in mining as in commercial partnerships, for the reason that all are not agents, yet, manifestly, neither partner has the right to engage in any operations calculated in their very nature to operate to the detriment or disadvantage of the partnership property,[3] nor to negligently operate such property.[4]

§ 1566. Skill bargained for — When representatives not entitled to portion.— Where a partnership was formed to continue during the term of a lease, and where the main contribution was the skill of the partners, notwithstanding it was carried on as a general partnership and not specially as a mining partnership, it was held that the general rule which gives the representatives of a deceased partner the

[1] Hurd v. Tompkins, 17 Colo. 294.

[2] Hodgson v. Fowler, 24 Colo. 278, 50 Pac. Rep. 1034; Meagher v. Reed, 14 Colo. 335, 24 Pac. Rep. 681.

[3] Fawcett v. Whitehouse, 1 Russ. & M. 132; Clegg v. Edmondson, 8 De Gex, M. & G. 787; Burton v. Wookey, 6 Madd. 367; Kimberly v. Arms, 129 U. S. 512; Jennings v. Rickard, 10 Colo. 395, 15 Pac. Rep. 677; Continental Divide M. Co. v. Bliley, 23 Colo. 160, 46 Pac. Rep. 633; Jones v. Dexter, 130 Mass. 360; Hirbour v. Reading, 3 Mont. 13; Collins v. Case, 23 Wis. 230.

[4] *Ante*, § 1532.

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proper share of proceeds of a partnership continued after his death by the others, with firm assets, did not apply.[1]

§ 1567. General rule — Representatives of deceased partner entitled to full share of remainder.— Without criticising too much the position of the New Jersey court in the last section, which was doubtless justified under the peculiar terms of the partnership in question, it suffices to say that the general rule established by a long line of cases in England, and recognized in this country, gives due observance to the interest of representatives of deceased partners, and recognizes their right to participate either in the continuing mining partnership or in the proceeds after the debts are paid, it being remembered that the death of the partner does not dissolve the partnership, and the same can only be dissolved by the voluntary action of one or more of the parties.[2]

Article F.

Dissolution.

§ 1575. Dissolution and termination of partnership relation — How accomplished.
1576. Notice must be given to prevent future liability.
1577. When court of equity will intervene.
1578. By death under the old rule — By statute in England.
1579. Rights of incoming and outgoing partners.
1580. Generally no dissolution by mere forfeiture.
1581. Summary — Doctrine of this chapter restated.

§ 1575. Dissolution and termination of partnership relation — How accomplished.— Since the death, withdrawal, or sale of his interest by a member does not operate as a

[1] Phillips v. Reader, 18 N. J. Eq. 95. To the same effect, see Duffield v. Brainard, 45 Conn. 424; Burdon v. Barkus, 4 De Gex, F. & J. 42.

[2] Brown v. Litton, 1 P. Wms. 140; Hammond v. Douglass, 5 Ves. 539; Crawshay v. Collins, 15 Ves. 218, 1 Jac. & W. 467; Featherstonhaugh v. Fenwick, 17 Ves. 298; Brown v. De Tastet, Jac. 284; Wederburn v. Wederburn, 2 Kean, 722; Palmer v. Mitchell, 3 M. & K. 672; Stocken v. Dawson, 9 Beav. 239; Featherstonhaugh v. Turner, 29 Beav. 382; Simson v. Chapman, 4 De Gex, M. & G. 154; Stoughton v. Lynch, 1 Johns. Ch. 467.

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dissolution,[1] it would seem that, ordinarily, there would be no occasion for a dissolution or winding up of its affairs until the object for which it was created had been accomplished, unless all the members so desired. Any member who becomes dissatisfied with the management may sever his connection with it by disposing of his interest, just as the holder of stock in a corporation may withdraw from it. Of course there is a technical dissolution, and a complete one, so far as the withdrawing member is concerned, whenever one of the members sells out or withdraws.[2] Cases may often arise, however, where the withdrawal of a member would work a great hardship upon him, and an appeal to a court of equity is the only practical solution of the difficulty. We will notice this elsewhere.[3]

§ 1576. Notice must be given to prevent future liability.— Since a member of a mining partnership may retire at pleasure, as a general rule, being liable only for such special damage as might actually result from breach of the contract, he must give substantially the same notice as in a trading partnership in order to end his liability and evade future responsibility.[4] This, as to those having knowledge of his membership in the firm, and no other notice or knowledge of its dissolution, and who have dealt with the firm on his liability or promise to answer.

§ 1577. When court of equity will intervene.— As previously noticed,[5] it is within the province of a court of equity to order the dissolution and winding up of the affairs of a mining partnership. In this as in all matters requiring

[1] *Ante*, §§ 1503, 1514.

[2] See Slemmer's Appeal, 58 Pa. St. 162, 11 M. R. 437. This is not, strictly speaking, a mining partnership case, yet it contains many of the essential elements of such an organization. See *post*, § 1577. The rule in this respect is similar to the one applicable to prospecting contracts. See *post*, § 1602 *et seq.*

[3] *Post*, § 1577.

[4] Vice v. Fleming, 1 Y. & J. 227; Carter v. Whalley, 1 B. & Ad. 11; Heath v. Samson, 1 Nev. & Man. 104; Martyn v. Gray, 14 C. B. 824; Waller v. Davis, 59 Iowa, 153; Hixon v. Pixley, 15 Nev. 475.

[5] *Ante*, § 1575.

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equitable interference, no fixed rule ought to be laid down as to what facts are necessary to justify the invocation of this remedy. It is sufficient to say that, when the court is satisfied that the members are discordant, and the partnership hopeless of prosperity, or for any other good reason the rights of the parties would be best subserved by a dissolution, it should not hesitate to order it.[1] The most equitable mode of settling the business, in such case, would seem to be by the appointment of a receiver to take charge of the property, and, if partition is impracticable, sell it and divide the proceeds, after a full accounting.[2]

§ 1578. By death under the old rule — By statute in England. — The old rule in England, according to Bainbridge, seems to have been that death, outlawry or bankruptcy dissolved a mining partnership,[3] but, as we have seen, this has long since ceased to be the rule. Since 1848 the rule in that country has been that all organizations, whether corporations or partnerships, must be wound up under the joint-stock companies winding-up act.[4]

§ 1579. Rights of incoming and outgoing partners. — Of course, in the absence of some special custom or circumstance to the contrary, the incoming partner is not liable

[1] Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828, 49 L. R. A. 468.

[2] Id. See also Slemmer's Appeal, 58 Pa. St. 162, 11 M. R. 437. The parties to this case were four brothers, who entered into a written agreement of partnership for the purpose of working a certain oil lease. The contract provided that either of the members might withdraw, in which case his interest should be acquired by the others, without working a dissolution. The case thus differing from a mining partnership, the interest in which might have been acquired by any one; but being similar to the extent that withdrawal of one, in the manner provided, worked no dissolution. A disagreement having occurred between one and the other three, necessitating an appeal to the courts, the supreme court ordered a sale of the property to the highest bidder, both sides being permitted to bid.

[3] Bainb. Mines (1st Am. from 3d Lond. ed.), p. 360; Waters v. Taylor, 2 Ves. & B. 299. See Ferreday v. Wightwick, 1 Russ. & M. 49; Jefferys v. Smith, 1 J. & W. 298.

[4] 7 & 8 Vict., ch. III; 8 & 9 Vict., ch. 98; Coll. Mines, p. 132; Wyld v. Wheal Lovell Co., 18 L. J. Ch. 134.

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generally for previous engagements of the partnership;[1] but he succeeds to all the rights;[2] and there are some cases which hold that he takes it with its burdens.

§ 1580. Generally no dissolution by mere forfeiture.—One notable distinction between the ancient cost-book system and the mining partnership of to-day is that the former rule of forfeiture for non-contribution of assessments is not generally recognized at this day. The California court has so far departed from the old rule as to refuse to declare a forfeiture of interest, and a consequent dissolution as to them, where the parties agreed in writing that their interests might be forfeited for non-payment of assessments, which were to be levied every four weeks.[3] This decision may be justified by the peculiar circumstances of the case, but it is a dangerous precedent to follow; for if a partner cannot contract in writing for the forfeiture of his interest in case of failure to meet his obligations, there is no remedy against him except by a suit in court. It is well recognized that parties may make an agreement, which will be binding, to submit their difficulties to arbitration; and we fail to see why they cannot also make a binding agreement providing for forfeiture in a case such as this, since there is no material distinction in principle.

In Colorado, where a mining partnership existed, and the members were engaged in operating a lease which one of the parties surrendered, taking a new one in his own name, it was held that the new one, as to the other partner, was a continuation of the old, and this notwithstanding the other partner had failed to pay his portion of the expense of working the lease for upwards of ninety days.[4] It will be observed, though, that there was no agreement in this, as

[1] Babcock v. Stewart, 58 Pa. St. 179; Counts v. Holthouse, 85 Pa. St. 235: Atwood v. Lockhart, 4 McLean, 350, 2 Fed. Cas. 201.

[2] Nisbet v. Nash, 52 Cal. 540; Snyder v. Burnham, 77 Mo. 52.

[3] Wiseman v. McNulty, 25 Cal. 230.

[4] Continental Divide M. Co. v. Bliley, 23 Colo. 130.

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in the California case, that failure to contribute should work a forfeiture.

§ 1581. Summary — Doctrine of this chapter restated. It will thus be seen that the mere ownership as tenants in common of a mining claim will not constitute a mining partnership. It is only when the owners operate it as such that the relationship is created. When once created, the general liability of each partner is measured, like his profits, by the relation which his interest bears to the whole; that the doctrine of selection of persons has no application, and that the selling out of one, or any other manner of changing the ownership, does not work a dissolution, but the successor in interest takes the place of the former owner; that each partner has not the right to bind his copartners in respect of the partnership business, but such authority must be delegated to a common agent who may be one of the partners; that their general liability may be increased and extended beyond these limits by any act which, under the rule of the law merchant, would make them liable, but such act only binds the individual interest of the acting partner, as it would a special person, and does not change the relationship of the other persons to him, or to each other; that the working of leases constitutes a mining partnership, as a general rule. It may be further stated that a trust relationship is nevertheless created between mining partners, and they may not ignore the rights of each other in respect to partnership funds; that while a location may be made, or any other business done by one partner, it will not generally inure to the benefit of his copartners in a general partnership unless partnership funds are used; yet, when one of the partners in a mining lease, or in any mining property, does some act in respect to his possession which he could not do, and would not do except on account of his relationship to his copartners, as, for instance, where one of the partners in a mining lease surrenders it before its expiration, and takes a new lease to himself, the new one will, as to the other partner, be considered as a continuation of the old.

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CHAPTER III.

PROSPECTING OR GRUB-STAKE CONTRACTS.

§ 1590. Prospecting or "grub-stake" contracts — In general.
1591. Prospecting contracts — Grub-stake contracts — History in this country.
1592. Same — Sometimes formed in writing, sometimes by parol.
1593. Other examples of a prospecting contract — Statute of frauds.
1594. Protected by estoppel.
1595. General controlling principles—Implied contracts — Expenses—Abandonment.
1596. Grub-stake contract — Implied rights.
1597. Mixed questions — Neither partnership nor grub-stake contract.
1598. Rights and duties of outfitter and prospector.
1599. Duty of outfitter.
1600. Right to abandon.
1601. Where prospector may not abandon.
1602. Abandonment and dissolution.
1603. As to agency of the parties.
1604. Necessary for outfitter to give notice.
1605. Summary — The doctrine of this chapter restated.

§ 1590. Prospecting or "grub-stake" contracts — In general. — Following, by close analogy, the cost-book system, a relation generally amounting to a mining partnership has grown out of what are popularly called "prospecting or grub-stake contracts." These are generally formed by one or more persons, called "outfitters," advancing or becoming liable for the expenses of a certain sum to another person called the "prospector" or "adventurer;" by which engagement the latter undertakes to locate or otherwise acquire mining property for the joint use and benefit of all concerned. Generally the quantity of interest to be owned by each is provided for in advance; if not, they will be presumed to own equally.[1]

[1] McDonald v. Upper Canada M. Co., 15 Grant Ch. 179; s. c., id. 551; Johnstone v. Robinson, 3 McCrary, 42, 16 Fed. Rep. 903; Fuller v. Harris, 29 Fed. Rep. 814; Gore v. McBrayer, 18 Cal. 582; Miller v.

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§ 1591. Prospecting contracts—Grub-stake contracts—History in this country.—In the days of the gold excitement in California the hope of securing large rewards at small expense, and the fabulous fortunes made at gold mining, naturally excited the cupidity of even the slow-going New Englanders, and it became of very frequent occurrence that one or more persons would engage one or more other persons to go out to California to prospect for gold. The persons making the engagement were called the "outfitters," the others the "prospectors." By these contracts, generally, the outfitters were to have a certain interest in all the mines discovered, or the prospector or agent was to purchase mines and they were to furnish the money and were to have a certain interest therein. Naturally, bad bargains were made and dishonest prospectors encountered, the natural result of which was litigation. This habit, having its birth under those circumstances, with the cost-book system of England as a precedent, was carried into the western states, where it became of such frequent occurrence as to

Butterfield, 79 Cal. 62, 21 Pac. Rep. 543; Settembre v. Putnam, 30 Cal. 490; Henderson v. Allen, 23 Cal. 519; Page v. Summers, 70 Cal. 121, 12 Pac. Rep. 120; Harris v. Hillegass, 54 Cal. 463; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. Rep. 803; Murley v. Ennis, 2 Colo. 300; Lawrence v. Robinson, 4 Colo. 567; Chadbourne v. Davis, 9 Colo. 581; Jennings v. Rickard, 10 Colo. 395; Meylette v. Brennan, 20 Colo. 242, 38 Pac. Rep. 75; Abbott v. Smith, 3 Colo. App. 264, 32 Pac. Rep. 843; Hoyt v. Smith, 23 Conn. 177; s. c., 27 Conn. 63; s. c., 28 Conn. 466; North Georgia M. Co. v. Latimer, 51 Ga. 47; Skidmore v. Eikenberry, 53 Iowa, 621; Oliphant v. Woodburn Coal Co., 63 Iowa, 332, 19 N. W. Rep. 212; Compo v. Jackson Iron Co., 49 Mich. 39, 12 N. W. Rep. 901; Esconvas v. Louisiana Coal-oil Co., 22 La. An. 280; Breed v. Judd, 1 Gray, 455; Pierce v. Bucklin, 7 Allen, 261; Goodell v. Smith, 9 Cush. 592; Field v. Woodmansee, 10 Cush. 427; Duff v. Maguire, 107 Mass. 87; Boucher v. Mulverhill, 1 Mont. 306; Hirbour v. Reading, 3 Mont. 18; Isaacs v. McAndrew, 1 Mont. 437; Welland v. Huber, 8 Nev. 203; Harvey v. Coffin, 44 N. H. 563; Cotheal v. Talmage, 9 N. Y. 551; Rhea v. Van Noy, 1 Jones' Eq. 282; Eagle v. Bucher, 6 Ohio St. 295; Scott v. Clark, 1 Ohio St. 382; Waring v. Cram, 1 Pars. Sel. Eq. Cas. 516; Fletcher v. Hawkins, 2 R. I. 330; Thompson v. Prouty, 27 Vt. 14.

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establish certain and definite rights and corresponding duties in favor of each of the respective parties, and was the subject of much litigation. It will not, however, require an extensive examination here, as one of the relationships thus created was, as noted in the preceding section, that of mining partnerships, which we discussed in the last preceding chapter.

§ 1592. Same — Sometimes formed in writing, sometimes by parol.— As a general rule the parties define their rights and duties by written contracts, which necessitate, at the hands of the courts, construction only. In other cases, the relations are established by oral contracts, and in still others by necessary implication from the acts of the parties. These latter relations are the sources of the greatest difficulty, as it becomes a question where the rights of the respective parties begin and end. It is a matter of indifference whether these contracts are in writing or parol. The courts enforce them if they are acted upon.[1]

§ 1593. Other examples of a prospecting contract — Statute of frauds.— The situation and relation of the parties is thus stated by the supreme court of Colorado, in a case which has been followed a number of times: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises, no provision of the statute of frauds is violated. . . . Each associate is the agent of all the others, and every act done by either about the joint adventure is the act of all. In such case, as in the case of partnership transactions, the effect of the contract of association is simply to fix the terms of the

[1] Gore v. McBrayer, 18 Cal. 582; Pac. Rep. 803; Hirbour v. Reading, Welland v. Huber, 8 Nev. 203; 8 Mont. 13; Murley v. Ennis, 2 Colo. Moritz v. Lavelle, 77 Cal. 10, 18 800.

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agency and to determine how far each may be said to act for himself, and how far for his co-adventurers. Such contract of association is merely the creation of an agency in each of those contracting, and is no more a violation of law than a contract of partnership or association in any lawful calling. The contract of association is equally valid, although, by the terms thereof, one of the associates is to conduct the exploration and perform the work of development, while the others provide and furnish the supplies necessary."[1]

§ 1594. Protected by estoppel.— Peculiar rights similar to mining partnership and resembling a prospecting contract may sometimes be created by estoppel and protected by that principle; that is, where one person has acted in such a manner, and made such representations to another, as that the law will not permit him to dispute such person's title acquired on the faith of those representations. For instance, where Harris and Juneau organized the Harris mining district in the presence of three Indians, to make up a supposed requisite number of five, and Juneau, who was prospecting for plaintiff as outfitter, sold his interest in a claim located in said district to others, and Harris located a conflicting claim over the claim of plaintiff and Juneau so located, but in the meantime wrote plaintiff that the claim of plaintiff and Juneau was the oldest claim in the district, and plaintiff continued to act upon that belief, it was held that Harris was thereby estopped to maintain that his own location was the oldest.[2]

§ 1595. General controlling principles — Implied contracts — Expenses — Abandonment.— Of course, where the parties have defined their rights by written contracts, it is

[1] Murley v. Ennis, 4 Colo. 300, 304; Meylette v. Brennan, 20 Colo. 242; Hirbour v. Reading, 3 Mont. 13; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. Rep. 318; Lakin v. Sierra Buttes M. Co., 25 Fed. Rep. 337.

[2] Fuller v. Harris, 29 Fed. Rep. 814. The rights of these parties under a relocation attempted by one to the exclusion of the other are discussed in a previous section. *Ante*, § 587.

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only necessary for the courts to construe these and fix the rights of the parties accordingly. But, as previously stated, it not infrequently occurs that the contracts are partially or wholly implied. We will notice a few of these special cases which have received attention by the courts.

Thus, five men engaged a sixth man to go to California with a view of examining properties and buying the same, and agreed to advance such sum, not exceeding five thousand dollars each, as should be necessary to purchase any such properties; the sixth man (defendant) went to California, for which purpose the others advanced him five hundred dollars; he remained some six months, and examined several properties, and partly engaged for the purchase of some of them, when the outfitters changed their minds and wired him accordingly. Defendant returned home, and in an action for services rendered it was held that he was entitled to five-sixths of his expenses and salary at the rate of three hundred dollars per month, less one-sixth of the five hundred dollars already advanced.[1]

The prospector is not liable for unavoidable losses.[2] He is entitled to his expenses, not only in going, but also in returning.[3] But the general rule is that if, before the contract is abandoned, forfeited or dissolved, the prospector engages in another business whereby he reaps a profit, and the prospecting contract provides for the employment of all his time in the business of the adventure, his co-adventurers are entitled to an accounting and to their share of the profits.[4]

§ 1596. Grub-stake contract — Implied rights.— So it has been held that where the prospector makes locations in

[1] Duff v. Maguire, 107 Mass. 87, 12 M. R. 353. See also Berry v. Woodburn, 107 Cal. 504, 40 Pac. Rep. 802.

[2] Pierce v. Bucklin, 7 Allen, 261, 12 M. R. 340.

[3] Thompson v. Prouty, 27 Vt. 14, 12 M. R. 290; Isaacs v. McAndrew, 1 Mont. 437, 9 M. R. 690.

[4] Hoyt v. Smith, 28 Conn. 466, 12 M. R. 325; Murley v. Ennis, 2 Colo. 300; North Georgia M. Co. v. Latimer, 51 Ga. 47, 12 M. R. 367.

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his own name, without joining his co-adventurers, no matter whether they simply furnish the supplies in the form of a "grub stake," whether the contract was simply oral, they agreeing to furnish certain money and the prospector agreeing to furnish his time, or whether it is in writing, definitely fixing their rights, the result is the same — they are entitled to their share.[1] There is an implied promise that the prospector will convey, without demand, the interest to which each is entitled.[2] And specific performance will be enforced in such cases[3] which are not within the statute of frauds.[4]

§ 1597. Mixed questions — Neither partnership nor grub-stake contract. — In a late case in California it was held, under the civil code of that state, that a contract by which a stranger agrees to work the mine, paying one-half of the expenses and receiving one-half of the product as compensation, is merely a contract for hiring and does not constitute him a partner, nor yet create a grub-stake contract.[5] A still more recent decision of that court held an allegation that plaintiffs furnished money to defendant "as a grub stake to enable him to go to Alaska or the Northwest Territory, Canada, to prospect for gold and other precious metals, and to locate and acquire mines and mining claims," did not state a mining partnership agreement under the California code, because it did not appear that the parties were actually associated together for the purpose of owning and operating a mining claim; and that it failed to state a grub-stake contract because it did not

[1] Settembre v. Putnam, 80 Cal. 490, 11 M. R. 425; Boucher v. Mulverhill, 1 Mont. 306; Eagle v. Bucher, 6 Ohio St. 295, 12 M. R. 330; McDonald v. Upper Canada M. Co., 15 Grant's Ch. 179; Harris v. Hillegass, 54 Cal. 463.

[2] Welland v. Huber, 8 Nev. 203.

[3] Welland v. Huber, *supra;* Murley v. Ennis, 2 Colo. 300; Sears v. Collins, 5 Colo. 492; North Georgia M. Co. v. Latimer, 51 Ga. 47.

[4] Hirbour v. Reeding, 3 Mont. 13, 11 M. R. 514; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. Rep. 818; Lakin v. Sierra Buttes M. Co., 25 Fed. Rep. 337. See also *ante*, § 1593.

[5] Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970.

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appear that the property in question was acquired pursuant to the grub-stake contract.[1]

§ 1598. Rights and duties of outfitter and prospector. The outfitter, upon advancing the sum stipulated for, or performing the conditions required of him, has the right to the undivided time and labor of the prospector. Whence it follows that so long as the outfitter complies with his engagements, the prospector has no right to engage in any other business, nor acquire any other property without the consent of the outfitter, and, if he does so, the outfitter is entitled to his share thereof. As was said by the Pennsylvania common pleas court, quoting from Sir John Leach: "It is, says Sir John Leach, in that case, 'a maxim of the courts of equity that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust and confidence.' Nor will equity permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gives them a direct interest adverse to the original objects of their association."[2]

§ 1599. Duty of outfitter.— On the other hand, it is the duty of the outfitter to seasonably pay and discharge all legitimate demands provided for in the contract, or within the reasonable scope of the enterprise. This is a part of the contract. It is one of the conditions upon which the prospector agrees to go out and search for and develop mining claims. A failure on his part to keep this engagement, after having been given a fair opportunity to do so, is sufficient

[1] Prince v. Lamb (Cal., 1900), 60 Pac. Rep. 689.

[2] Waring v. Cram, 1 Pars. Sel. Eq. Cas. 516, 12 M. R. 280, quoting from Burton v. Wookey, 6 Madd. 367, and citing Glassington v. Thwaites, 1 Sim. & S. 124, 138; Fanning v. Chadwick, 3 Pick. 240. See also Hoyt v. Smith, 23 Conn. 177; s. c., 28 Conn. 466

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justification, under some of the authorities,[1] for the prospector to consider the whole adventure abandoned, and thenceforth act entirely on his own account. It would certainly be sufficient provocation, in any case, to justify him in giving the outfitter notice that the contract is abandoned.[2]

§ 1600. Right to abandon.— In the absence of an agreement specifying a fixed period of time for the duration of the relationship, it would seem that either party has the right to abandon the enterprise at any time. But, like the cost-book rule, he must close up and settle all arrearages and render an account before he will be discharged. Where a company was organized to go to California, and entered into writings in the nature of a prospecting partnership agreement, and where a majority vote was to control, and after arriving in California a majority decided to disband, it was held that there was no undertaking on the part of the defendant, who, it seems, did not vote for a dissolution, that it would continue the specified time, and that his action constituted no breach; also, that in the absence of stipulations to the contrary such contracts may be dissolved at pleasure.[3]

§ 1601. Where prospector may not abandon.— As a general rule, where the parties stipulate in their contract that it shall continue for a specified time, a mere majority vote will not dissolve the partnership.[4] And where the parties known as outfitters engage the prospector on account of special skill, he is not at liberty to retire at pleasure.[5] But, as a general rule, forfeitures are not favored.[6]

[1] Goodell v. Smith, 9 Cush. (Mass.) 592; Murley v. Ennis, 2 Colo. 300.

[2] See next four sections *post*.

[3] Harvey v. Coffin, 44 N. H. 563, citing Goodell v. Smith, 9 Cush. (Mass.) 592; Field v. Woodmansee, 10 Cush. 427.

[4] Von Schmidt v. Huntington, 1 Cal. 55.

[5] Eagle v. Bucher, 6 Ohio St. 295. And if a specified penalty has been provided for a breach, it will be enforced. Von Schmidt v. Huntington, *supra*. This is on the score of liquidated damages. Cotheal v. Talmage, 9 N. Y. 551; Fletcher v. Dyche, 2 T. R. 32; Astley v. Weldon, 2 Boss. & Pul. 346; Smith v. Smith, 4 Wend. 468.

[6] Wiseman v. McNulty, 25 Cal.

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§ 1602. Abandonment and dissolution.— But where there is nothing in the terms of the contract to the contrary, the prospecting contract may usually be dissolved at the pleasure of either party without previous notice to the other. This may always be done unless such conduct on the part of either party would work an injury upon the other, such as the advancement of unearned money by the outfitter, or the earning of unpaid money by the prospector. In all such cases there must be a full and complete settlement and accounting before the relations can be severed, except by mutual consent.[1] But it may be treated as abandoned upon the breach by either party.[2]

§ 1603. As to agency of the parties.— The rule was announced at an early day in Colorado,[3] that an agreement between two or more persons to engage in the business of prospecting for and development of mining property is in the nature of a partnership agreement, and each is the agent of the other. What the court meant by this was, very likely, that, to the extent of locating any claims in his own name, each acted as the agent of the other, and the title thus obtained would inure to the benefit of all. This would undoubtedly be the correct rule, as we have attempted to show.[4]

§ 1604. Necessary for outfitter to give notice.— While either party may dissolve a prospecting agreement at pleasure,[5] this may not be done arbitrarily, or without notice to the other. Before he will be permitted to so treat it, he must give clear and unequivocal notice to that effect to the others. Thus, where there is a prospecting agreement between the outfitter and a prospector, under which the out-

230; Coleman v. Clements, 23 Cal. 245.

[1] Lawrence v. Robinson, 4 Colo. 567; Crawshay v. Maule, 3 Swanst. Ch. 495, 11 M. R. 223.

[2] Murley v. Ennis, 2 Colo. 300; Chadburn v. Davis, 9 Colo. 581; Harvey v. Coffin, 44 N. H. 563, 12 M. R. 336; Page v. Summers, 70 Cal. 121, 12 Pac. Rep. 120.

[3] Lawrence v. Robinson, 4 Colo. 567.

[4] *Ante*, §§ 1596, 1598.

[5] *Ante*, §§ 1600, 1602.

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fitter furnishes necessary supplies, and the prospector discovers mines which they own jointly as mining partners, and the outfitter furnishes all the supplies for years, but finally notifies a co-outfitter that he wants a settlement, this act alone will not dissolve the partnership, nor be treated as an abandonment of the prospecting contract.[1] He must notify the prospector of any intention to abandon.

§ 1605. Summary — The doctrine of this chapter restated.— A careful review of the foregoing sections justifies the conclusion that prospecting or grub-stake contracts are recognized and upheld by the law, and are recognized by the courts, and that they need not be in writing.

The utmost good faith is due from the prospector to the outfitter, and he may not, so long as the contract subsists, prospect on his own account, and consequently cannot locate claims on his own account.

He is not liable, however, for unavoidable losses, and is generally entitled to his expenses where not otherwise expressly provided for in the contract.

In respect to any claim located, whether in the name of the prospector or in the names of both, they are mining partners while operating it, and where located in the name of the prospector he is a trustee for the outfitter and for the partnership, and is bound to convey upon demand.

It is the duty of the outfitter to seasonably pay all reasonable demands fairly within the terms of the contract, and upon his failure to do so the prospector has the right to elect that the relationship be terminated.

Unless there is a fixed period stipulated for, or a fixed district or country to be prospected, either party has the right to abandon at any time, but never to the injury of the other, nor for the purpose on the part of the prospector of prospecting the same district for his own account.

[1] Abbott v. Smith, 3 Colo. App. 264, 32 Pac. Rep. 843, citing Chadbourne v. Davis, 9 Colo. 581, 13 Pac. Rep. 721; Meagher v. Reed, 14 Colo. 335, 24 Pac. Rep. 681; Eagle v. Bucher, 6 Ohio St. 295; Boucher v. Mulverhill, 1 Mont. 306.

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CHAPTER IV.

OF THE MINING SUPERINTENDENT.

§ 1611. Preliminary and introductory.
1612. Scope of treatment — Mine boss.
1613. General authority and duties of mine superintendent — Implied authority.
1614. Necessaries furnished by third persons.
1615. Promissory note — Borrow money.

§ 1611. Preliminary and introductory.— Since it would be impossible, in the case of a mining partnership, for the management to be undertaken directly by the entire partnership, they being similarly situated in that respect to a corporation, it becomes necessary for both a partnership and a corporation to operate through the intermediary of a mining superintendent, who is no more than a general or special agent, as the case may be, and whose general powers and duties are fixed and circumscribed by the general law of agency; yet, there are a few special matters relating to the powers of a mining superintendent that are not entirely out of place in a work of this kind.

§ 1612. Scope of treatment — Mine boss.— In the next succeeding part of this work we shall treat of those statutory provisions obtaining in some of the states whereby a certain functionary, called mine boss, with certain required qualifications, must be employed in obedience to statute. All of which has nothing to do with the matter in hand.

§ 1613. General authority and duties of mine superintendent — Implied authority.— It seems that the mining superintendent is impliedly authorized to purchase all necessary supplies and provisions for the operation of the mine

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in the usual manner.[1] What we have said in the preceding chapter with reference to the powers of one mining partner to bind another applies with equal force here. Thus, it has been held with reference to the operating co-partner who is, for the particular place, superintendent, that he can bind the partnership under his implied authority for those engagements, fixtures, appliances and supplies usual and necessary in the operation of the mine in the customary manner.[2]

§ 1614. Necessaries furnished by third persons.— So it has been held in California that the owner of a mine is liable for the price of necessary provisions furnished to the boarding-house keeper with whom the miners boarded, where it was also shown that the superintendent was in the habit of purchasing provisions for the use of the boarding-house, which were paid for by the owners of the mine, and all of this was within the knowledge of plaintiff, who parted with his goods on the faith of such custom.[3] But in all such cases the authority of the superintendent to act must be established, either by the nature of the transaction itself or by express agreement. And where A. had agreed to give B. a certain interest in a mine after he, A., should receive a certain sum out of it, that relationship did not give B. such an interest in it as to bind the mine, in his contract with C., for necessaries or for supplies,[4] the fact being that A. had the absolute title to the mine.

§ 1615. Promissory note — Borrow money.— It has been held that the superintendent of a mine cannot borrow money on the credit of the mine owner,[5] but he has power

[1] Stuart v. Adams, 89 Cal. 367, 26 Pac. Rep. 970. See also Heald v. Hendy, 89 Cal. 632, 27 Pac. Rep. 67.

[2] Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

[3] Heald v. Hendy, 89 Cal. 632, 27 Pac. Rep. 67.

[4] Eaton v. Rocco, 75 Cal. 93, 16 Pac. Rep. 529.

[5] Hawtayne v. Bourne, 7 M. & W. 507; Randall v. Meredith, 76 Tex. 669, 13 S. W. Rep. 576.

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to enter into a contract for the sale of all the ores of the mine produced within a given period.[1] And wherever the authority of the superintendent is doubtful, if there is any ratification made with such knowledge as to work an estoppel, of course that settles the question and the owners are bound.[2]

[1] Robert E. Lee M. Co. v. Omaha & G. S. & R. Co., 16 Colo. 118, 26 Pac. Rep. 326, citing Story, Ag., § 93; 1 Para. Cont. 44; Ang. & A. Corp. 297, 298; Bates v. Iron Co., 7 Metc. (Mass.) 224; Smith v. Peoria Co., 59 Ill. 412; Packet Co. v. Parker, id. 28; Fay v. Noble, 12 Cush. 16; Green's Brice's Ultra Vires, 426, note; Union, etc. M. Co. v. Rocky Mt. Nat. Bank, 1 Colo. 532, 2 Colo. 248; McKiernan v. Lenzen, 56 Cal. 61.

[2] Shaver v. Bear River, etc. W. & M. Co., 10 Cal. 396. See also authorities in last preceding note; Reese v. Bald Mountain Con. G. M. Co. (Cal.), 65 Pac. Rep. 578.

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CHAPTER V.

OF CERTAIN REMEDIES AND THEIR PECULIAR RELATION TO MINING.

ARTICLE A.

Working Out of Bounds — Measure of Damages.

§ 1620. General observations.
1621. Measure of damages — Innocent taking — Honest belief of ownership.
1622. Absence of negligence essential.
1623. Same — The general rule.
1624. Damages — How proved.

§ 1620. General observations.— The action for damages for working out of bounds, either in the direct form of trespass and damage, damages alone when the title is not in dispute, or the action of ejectment and damages for withholding, are all appropriate remedies in their proper cases for injuries occasioned in consequence of mining outside of the limits of one's own claim and in that of his neighbor, commonly called "working out of bounds."[1] As said by Mr. Bainbridge: "There is no more fertile cause of annoyance to mine owners than the working out of bounds; for it not only is a serious trespass in itself, often involving much loss of property, but it may occasion irremediable disasters to mining works. The premature bursting of barriers may occasion the most fatal effects, both to property and to life. For this evil a very inadequate remedy is provided."[2] All of which was true at that time, when the injured party was compelled to rely solely upon his action of

[1] Bainb. Mines (1st Am. from 3d Lond. ed.), 514; Hilton v. Woods, L. R. 4 Eq. 432; Maye v. Tappen, 23 Cal. 306; Goller v. Fett, 20 id. 481.

[2] Bainb. Mines, *supra*.

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trespass for relief.[1] But, as we shall see later on in this work, while he may maintain the action for damages in either of the forms mentioned above, he may besides that, and without waiting for serious injury, resort to the remedy of preventive justice by obtaining an injunction against the further trespass.[2]

§ 1621. Measure of damages — Innocent taking — Honest belief of ownership.— There are some cases holding the measure of damages to be the value of the ore or coal at the pit's mouth, or on the dump of the mine, without anything for breaking or bringing it to the surface.[3] Another line of cases holds that the value after severance and before removal is the true measure of damages;[4] while still others, and what is believed to be the better reasoned cases and more consonant with exact justice, fix the measure of damages at the value of the ore or coal as it existed in place before it was broken down.[5] This, as we shall see later on,[6]

[1] Bainb. Mines, 514. See also note 1, *ante*, p. 1176; Coleman's Appeal, 62 Pa. St. 252; Bennett v. Thompson, 3 Iredell Law, 146; Lykens Valley Coal Co. v. Dock, 62 Pa. St. 232.

[2] *Post*, art. B, this chapter; Norris v. Chambers, 30 L. J. Ch. 885.

[3] Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Wild v. Holt, 9 M. & W. 672; McLean County Coal Co. v. Long, 81 Ill. 359. See Jegon v. Vivian, L. R. 6 Ch. 742; Bennett v. Thompson, 13 Ired. (S. C.) 146; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428.

[4] Llynvi Coal Co. v. Brogdon, L. R. 11 Eq. 188; Robertson v. Jones, 71 Ill. 405; Illinois & St. Louis Ry. Co. v. Ogle, 82 Ill. 627; Thomas Pressed Brick Co. v. Herter, 60 Ill. App. 58; Sunnyside Coal Co. v. Reitz, 14 Ind. App. 478, 43 N. E. Rep. 46; Barton Coal Co. v. Cox, 39 Md. 1; Franklin Coal Co. v. McMillan, 49 Md. 549.

[5] Wood v. Morewood, 3 Q. B. 440; Re United Merthyr Coal Co., L. R. 15 Eq. 46; Hilton v. Woods, L. R. 4 Eq. 432; Livingstone v. Rawyards, L. R. 5 App. Cas. 25; Powell v. Aikin, 4 Kay & J. 343; Clowser v. Joplin M. Co., 4 Dillon, 469; Colorado Cent. M. Co. v. Turck, 70 Fed. Rep. 294; Cheeseman v. Shrieve, 40 Fed. Rep. 787; Durant M. Co. v. Percy Cons. M. Co., 93 Fed. Rep. 166; Golden Reward M. Co. v. Buxton, 97 Fed. Rep. 413; Waryear Coal & C. Co. v. Mabel M. Co., 112 Ala. 624, 20 S. Rep. 918; Alta M. & S. Co. v. Benson M. & S. Co., 16 Pac. Rep. 565; Maye v. Tappen, 23

[6] *Post*, § 1643.

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is a commercial value, having reference to the expense of winning and marketing.

§ 1622. Absence of negligence essential.— All of these cases proceed upon the theory, and it is essential to the limits thus fixed in any of the cases, that the trespass is innocently committed; that is, that there was no actual knowledge, or reasonable means of knowledge, of the exact boundary, or that it was committed upon a well-founded belief that the ore was being taken within the taker's boundaries, or under a claim of right preferred in good faith. Where, however, the trespass was wilfully committed or intentionally done, or where the taker was guilty of such negligence as to afford a just inference that he acted knowingly and intentionally, then he may be held liable for the full value of the ore or coal taken, with interest from the time of the taking, and without recoupment, as compensation for breaking, raising, winning, washing or marketing.[1]

Cal. 206; Goller v. Fett, 30 Cal. 481; Hendrix v. Spring Valley M. & I. Co., 58 Cal. 190; Empire G. M. Co. v. Bonanza G. M. Co., 67 Cal. 406, 7 Pac. Rep. 810; St. Clair v. Cash G. M. & M. Co., 9 Colo. App. 435, 47 Pac. Rep. 466; Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925; United Coal Co. v. Canyon City Coal Co., 24 Colo. 116, 48 Pac. Rep. 1044; Chamberlain v. Collinson, 45 Iowa, 429; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Hartford Iron Co. v. Cambria Iron Co., 93 Mich. 90, 53 N. W. Rep. 4; Ham v. Sawyer, 38 Mo. 37; Austin v. Huntsville C. & M. Co., 72 Mo. 535; Waters v. Stevenson, 13 Nev. 157; Dyke v. National Trans. Co., 49 N. Y. S. 180; Forsyth v. Wells, 41 Pa. St. 291; Lykens Valley Coal Co. v. Dock, 62 Pa. St. 232; Ege v. Kille, 84 Pa. St. 333, 10 M. R. 213; Freck v. Locust Mountain C. & I. Co., 86 Pa. St. 318; Ross v. Scott, 15 Lea, 479. See Tipping v. Robbins, 71 Wis. 507; Little Pittsburg Cons. M. Co. v. Little Chief M. Co., 11 Colo. 223, 17 Pac. Rep. 760; *ante*, § 1451.

[1] Powell v. Aiken, 3 Kay & J. 343; Durant M. Co. v. Percy Cons. M. Co., 93 Fed. Rep. 166; Golden Reward M. Co. v. Baxton, 97 Fed. Rep. 413; Sunnyside Coal Co. v. Reitz, 14 Ind. App. 478, 43 N. E. Rep. 46; United States v. Magoon, 3 McLean, 171; Maye v. Tappen, 23 Cal. 206; Williams v. May, 44 Kan. 179, 24 Pac. Rep. 52; Attersoll v. Stevens, 1 Taunt. 183; Chamberlain v. Collinson, 45 Iowa, 429; Grubb v. Bayard, 2 Wall. Jr. 81; Brandt v. McKeever, 18 Pa. St. 70; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Baker v. Hart, 123 N. Y. 470, 25 N.

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§ 1623. Same — The general rule. — In precious-metal mining it is the duty of the mining operator, in exercising his right to follow the vein on its downward course, to be certain that he is wholly within the vertical planes of his own boundary, or that he is exercising his extra-lateral right within the limits authorized by the statutes of the United States and the decisions thereunder; that is, within the limits of his end lines extended in their own direction so as to intersect the outside parts of such lodes or veins; and the term "end lines," as here used, means, of course, those judicially determined to be such. In all other mining regions where the extra-lateral right does not prevail, it is the duty of the mining operator to keep within the limits of his surface boundaries extended vertically downward. Of course, an unintentional mistake, as we have seen, in either case renders him only liable for the actual damage. The rule is different, as we have also seen, where the trespass is wilful and committed under circumstances indicating actual or presumed knowledge of the presence of boundaries and the consequent mining beyond them.

Not to repeat at too great length, but as a fairly complete collection of the authorities upon this question, we take the liberty of quoting from the circuit court of appeals of the eighth circuit, where an accurate statement of the law is made as follows: "One who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more. He may limit the recovery of the owner by deducting from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point; and from the value of the timber at the boom, the cost of cutting, hauling and driving it to that locality. But one who wilfully and in-

E. Rep. 948; Ashman v. Wigton land Coal Co., 68 Md. 125, 11 Atl. (Pa.), 12 Atl. Rep. 74; Koch v. Mary- Rep. 700.

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tentionally takes ores, timber or other property from the land of another must respond in damages to him for the full value of the property taken, at the time of his conversion of it, without any deduction for the labor bestowed or expenses incurred in removing and preparing it for the market. It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them.[1]

§ 1624. Damages — How proved.— Respecting the mode of proof of damages as to ore removed, while we may not go into it extensively, it is proper to say, in passing, that actual weights and values are, of course, the best proof where the taker has kept either. Where he has not, however, especially if it is his habit to keep weights and values, it is a strong circumstance against him, and it will ordinarily not be error to submit the highest provable value to the jury. It is very seldom, indeed, that the opening made in mining exactly corresponds with the size of the ore body removed,

[1] Durant M. Co. v. Percy Cons. M. Co., 93 Fed. Rep. 166, citing (which see) Wooden-Ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 12 Sup. Ct. 877; Cheeseman v. Shrieve, 40 Fed. Rep. 787; Colorado Cent. Cons. Mining Co. v. Turck, 17 C. C. A. 128, 70 Fed. Rep. 294, 301; Whitney v. Huntington, 37 Minn. 197, 33 N. W. Rep. 561; King v. Merriman, 36 Minn. 47, 35 N. W. Rep. 570; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 6 M. R. 317; St. Clair v. Cash G. M. & Milling Co., 9 Colo. App. 235, 47 Pac. Rep. 466; Dyke v. Transit Co. (Sup.), 49 N. Y. Supp. 180; Hartford Iron M. Co. v. Cambria M. Co., 93 Mich. 90, 53 N. W. Rep. 4; Warrior Coal & Coke Co. v. Mabel M. Co., 112 Ala. 624, 20 S. Rep. 918; Ross v. Scott, 15 Lea, 479; Hilton v. Woods, L. R. 4 Eq. 441; Omaha & G. Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925; United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 Pac. Rep. 1045.

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and, of course, where the size is disputed, that together with values becomes a question of fact for the jury.

It is also proper to submit to the jury the values based upon fragments of ore taken from that remaining in the stope, or upon either wall. This rule was recently recognized by the circuit court of appeals for the eighth circuit in a case before it on appeal from the federal court for the district of South Dakota.[1] The trial court permitted samples to be taken from ore remaining in the stope, from which the jury were permitted to estimate the value of the ore removed. This was held correct, as was also the action of the trial court in permitting the miners to testify as to the kind of ore removed. The court, in very emphatic language, took occasion to hold that such proof as this is more convincing than the opinion of experts, expressed, as the court put it, "from the field of speculation and conjecture." This would also seem to be better evidence than would be obtained by basing the value upon assays taken by the opposite party.[2]

Article B.

Injunctions.

§ 1626. Preliminary and introductory.
1627. The jurisdiction.
1628. Explanatory — Qualifications on foregoing — Paper title *prima facie*.
1629. Duty to prevent irreparable injury.
1630. Patent title not necessary.
1631. Of the preliminary injunction — Denial or dissolution by bond.
1632. May make all lawful use without being enjoined.
1633. Tailings and debris.
1634. Laches.

[1] Golden Reward M. Co. v. Buxton M. Co., 97 Fed. Rep. 413, affirming s. c., 79 Fed. Rep. 868, citing, which see, St. Louis, etc. Ry. Co. v. Edwards, 78 Fed. Rep. 745 and cases; Missouri Pac. Ry. Co. v. Hall, 14 C. C. A. 153, 66 Fed. Rep. 868; Edward P. Allis Co. v. Columbia Mill Co., 12 C. C. A. 511, 65 Fed. Rep. 52; Hardy v. Merrill, 56 N. H. 227; Mercer v. Vose, 67 N. Y. 56.

[2] Golden Reward M. Co. v. Buxton M. Co., *supra*.

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§ 1626. Preliminary and introductory.— We shall not find it necessary to deal extensively with the subject of injunctions; that is the subject of many special works. There are certain peculiar circumstances in mining where the preventive remedy of injunction is proper, and we think a work on mining law would be incomplete that did not point out at least a few of the general and controlling cases where injunctions have been held proper. With the practice we shall not deal at all. But wherever there is grave doubt as to the ultimate ownership of the ore or coal, and where the plaintiff shows a *prima facie* case, as in a case of disputed boundaries, the court that did not tie the hands of both parties pending the final hearing would be, to say the least, not alert to the justice of the situation.

§ 1627. The jurisdiction.— Formerly the jurisdiction to grant injunctions was confined solely to courts of equity. But that rule is no longer adhered to in this country, and in all states where the reformed procedure obtains, the auxiliary injunction, or the provisional one, may be granted by a common-law court in an ordinary action of trespass.[1] And even in the federal court,[2] where this doctrine now obtains, a preliminary suit at law is no longer necessary.[3]

§ 1628. Explanatory — Qualifications on foregoing — Paper title prima facie.— Lest we be misunderstood in the last statement in the preceding section, it is proper to observe that the general rule which requires that the legal title be not in dispute before resorting to equity, for the

[1] Bracken v. Preston, 1 Pin. (Wis.) 584; Chapman v. Toy Long, 4 Sawy. 35; Bishop v. Baisley, 28 Oreg. 119, 41 Pac. Rep. 936; Allen v. Dunlap, 24 Oreg. 229, 33 Pac. Rep. 675; Le Roy v. Wright, 4 Sawy. 530, 15 Fed. Cas. 386; Derry v. Ross, 5 Colo. 295. Compare Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. Rep. 171.

[2] Union M. Co. v. Dangburg, 2 Sawy. 450, 24 Fed. Cas. 590, 8 M. R. 113; Cheeseman v. Shreve, 37 Fed. Rep. 36.

[3] United States v. Parrott, 27 Fed. Cas. 416, No. 15,998; Erhardt v. Boaro, 113 U. S. 537; St. Louis M. & M. Co. v. Montana Co., 58 Fed. Rep. 129.

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reason that courts of equity do not, in general, try legal actions, is much relaxed in modern times, owing, it is said, to the other equity jurisdiction which permits courts to exercise their powers, when not to do so would entail a multiplicity of suits.[1] Or where the acts complained of are such as tend to destroy the estate and occasion irreparable loss and damage,[2] and where the facts justify the issuance of an injunction, it will be granted, even though the title to the property is in dispute.[3] But the title is not in dispute so as to require the institution of an action at law to determine title to the minerals, where plaintiff shows title to the ground under a patent from the United States.[4] It is easy to see why this remedy should be granted more readily in a case where the person against whom it is asked is mining and removing the minerals than in almost any other case. When the minerals are once removed and marketed they are gone forever from the possession of either party. There is no reasonably accurate mode of measuring their value in a suit for damages. Besides which it is no extraordinary occurrence for the party removing them to prove absolutely irresponsible to a judgment for damages. No material inconvenience can result from an order of court restraining the removal of the minerals or directing that the proceeds be paid into court, pending the determination of the right to their possession, while a failure to extend this relief may result in irreparable hardship to one of the parties, who, though successful in the action, is unable to recover the fruits of his victory.

[1] Erhardt v. Boaro, 113 U. S. 537; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. Rep. 129; 1 Pom. Eq., p. 256, § 245; King v. Stuart, 84 Fed. Rep. 546; Thomas v. Nantahala Marble & Talc. Co., 58 Fed. Rep. 485; Anaconda Copper M. Co. v. Butte & B. M. Co., 43 Pac. Rep. 924, 17 Mont. 519.

[2] Dimick v. Shaw, 94 Fed. Rep. 266; Oolagah Coal Co. v. McCaleb, 68 Fed. Rep. 86.

[3] Dimick v. Shaw, *supra*, p. 268, and cases; Oolagah Coal Co. v. McCaleb, *supra;* Erhardt v. Boaro, *supra*, citing Jerome v. Ross, 7 Johns. Ch. 315, 332; Le Roy v. Wright, 4 Sawy. C. C. 530, 535.

[4] St. Louis M. & M. Co. v. Montana M. Co., *supra*.

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§ 1629. Duty to prevent irreparable injury.— The glory of equity is said to rest upon its capacity to require the doing of and to mete out exact justice. And while no new jurisdiction is conferred upon equity by these actions,— only the application of old rules in another form,— it is conceded that at least an elastic application of old rules has been made.[1] So if the mischief complained of is irremediable, and consists in destroying or carrying away the minerals, the substance of the estate, equity would be unworthy the name if it did not interfere and prevent so serious an injury, even if the property is in dispute;[2] and especially when the disputed title is also sought to be settled in the action.[3] But it may safely be laid down as a general rule that color of title, or certainty of right at least, will be required before a preliminary injunction should be granted.[4]

§ 1630. Patent title not necessary.— Since a located claim is property in the highest sense of the term, one in possession or entitled to possession by virtue of a valid location may maintain injunction equally with the holder of a United States patent, for it must be remembered that as to any such question the titles are of equal dignity.[5] Equitable interests in mining property are as much entitled to protection by the courts as are legal ones, and are just as capable of assertion.

[1] Erhardt v. Boaro, 113 U. S. 537.

[2] King v. Buskirk, 78 Fed. Rep. 233; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. Rep. 129; Erhardt v. Boaro, *supra;* Staples v. Rossi (Idaho), 65 Pac. Rep. 67; Union M. & M. Co. v. Warren, 82 Fed. Rep. 522; Merced M. Co. v. Fremont, 7 Cal. 317; Buskirk v. King, 72 Fed. Rep. 22.

[3] Rainey v. H. C. Frick C. Co., 73 Fed. Rep. 389; Thomas v. Nantahala M. & T. Co., 58 Fed. Rep. 485; St. Louis M. & M. Co. v. Montana M. Co., *supra.*

[4] Morgan v. Baxter (Ga.), 38 S. E. Rep. 411; Real Del Monte M. Co. v. Pond M. Co., 28 Cal. 82; Johnson M. Co. v. Butte & B. M. Co., 70 N. Y. S. 257; Montana Ore Pur. Co. v. Same, 60 id. 684; Blondell v. Cons. Gas Co., 89 Md. 732, 43 Atl. Rep. 817; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. Rep. 513.

[5] Merced M. Co. v. Fremont, 7 Cal. 317; Sparrow v. Strong, 3 Wall. 97.

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We have elsewhere shown that the owner of an equitable interest may do the required annual labor and acquire all the rights thereby that the holder of a complete legal title would have.[1] This is essentially the law, because mining titles, held by a mining partner in trust for the unnamed partner, would otherwise be at the mercy of a dishonest holder of the legal title. So it may be regarded as settled law, that one possessing an equitable interest may maintain an injunction to prevent a serious trespass which will result in waste.[2] Thus, where an owner of a patent within a forest reserve has exchanged his entry under the act of congress,[3] and made a lieu filing upon vacant land, but upon which had been made a placer location for petroleum, in a suit for injunction brought by the successor in interest of the agricultural claimant against the locators of the oil claim, who had filed protest, upon the ground that the land so selected was not open to such selection, the court, while holding that the complainant, the successor of the lieu-selector, had such an equity as would enable it to maintain the suit, enjoined further operations pending the determination of the question by the land department, as to whether the land could be so selected.[4]

§ 1631. Of the preliminary injunction — Denial or dissolution by bond.— No objection can be made to a preliminary injunction upon the ground that it looks to the future; that is its office in most cases.[5] Injunction will issue to restrain, temporarily, an act, such as taking and carrying away

[1] *Ante*, § 495.

[2] Olive L. & D. Co. v. Olmstead, 103 Fed. Rep. 568; Northern Pacific Ry. Co. v. Hussey, 61 Fed. Rep. 231, 9 C. C. A. 468. *Contra*, Mfg. Gas Co. v. Gas Co., 155 Ind. 461, 57 N. E. Rep. 912; *ante*, § 1072.

[3] 30 Stat. at L. 11, 35, 36; 2 Supp. R. S. U. S., pp. 621–626.

[4] Olive Land & D. Co. v. Olmstead, *supra*. See also Ross v. McJunkin, 14 Serg. & R. 364; Toledo, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 746.

[5] Petrolia Mfg. Co. v. Jenkins, 51 N. Y. S. 1028.

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ore, which will result in great injury to the mine.[1] And it matters not, under the Indiana statute, that the injury could be compensated in damages.[2] But for the same reason that an injunction will be dissolved upon giving a bond to pay all damages, where compensation can be made, it will be denied upon giving the same bond.[3]

§ 1632. May make all lawful use without being enjoined. The courts will in all cases exercise discretion with reference to temporary or provisional injunctions, and not every imaginary wrong will justify the use of this extraordinary remedy.[4] Neither will it be granted where very great injury would thereby result to the opposite party. In such case the parties will be left to their remedies at law.[5] So, as a general rule, one may make all lawful use of his own without being enjoined. Following which principle, it was held by a Pennsylvania court that where A. and B. owned adjoining oil rights, in both of which the wells were old, and A. used suction-pumps to increase the flow of oil, the courts should refuse to restrain him.[6]

The supreme court, in upholding this judgment, called attention to the general rule that every one has the right to use his property in the usual and necessary manner, and any injury resulting to his neighbor from such use is *damnum absque injuria*.[7] This right was held to extend to the lawful boring for oil upon a party's premises, even though such

[1] Staples v. Rossi (Idaho), 65 Pac. Rep. 67; Buskirk v. King, 72 Fed. Rep. 22.

[2] Covert v. Bray (Ind.), 60 N. E. Rep. 709.

[3] Crescent M. Co. v. Silver King M. Co., 17 Utah, 444, 45 Pac. Rep. 1093. See Donohue v. Johnson, 9 Wash. 187, 37 Pac. Rep. 322; Coosaw M. Co. v. Farmers' M. Co., 51 Fed. Rep. 107.

[4] Nashville, etc. Ry. Co. v. McConnell, 82 Fed. Rep. 65.

[5] McBryde v. Sayre, 86 Ala. 458, 5 S. Rep. 791, citing Chambers v. Iron Co., 67 Ala. 353; Davis v. Sowell, 77 Ala. 262.

[6] Jones v. Forest Oil Co., 30 Pittsb. L. J. (N. S.) 58.

[7] S. C., 194 Pa. St. 379. See also Lybe's Appeal, 106 Pa. St. 626; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 145, 6 Atl. Rep. 456.

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operations might result in the draining of the oil well of his neighbor.[1]

In a recent federal case an injunction was refused because damages were adequate,[2] and in Montana against cutting timber, where defendant was solvent and able to pay all damages.[3] Courts do not lightly enjoin parties from operating property in their possession, nor appoint receivers to take property out of their possession.[4] After hearing and judgment adverse to plaintiff, he is not entitled to an injunction pending the appeal.[5] But when the entire matter is before the court on preliminary hearing, and it involves only the construction of a contract, the facts being admitted, it may grant final and permanent relief.[6]

§ 1633. Tailings and debris.— Of course, the mill or coal mine operator is bound to protect the lower proprietor on a stream against damage from the detritus from his mine or mill. As elsewhere foreshadowed,[7] this duty is absolute, varying only in some cases from the limited nature of the right invaded as compared with the necessity of a reasonable use. But, exercising a reasonable discretion, the court will in a proper case enjoin the dumping of tailings on land or in a stream;[8] but not unless the injury threatened is a material one.[9] For it must be remembered that it is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determining this

[1] Jones v. Forest Oil Co., 194 Pa. St. 379, citing Westmoreland, etc. Gas Co. v. De Witt, 130 Pa. St. 249, 18 Atl. Rep. 725, 5 L. R. A. 732.

[2] Kennedy v. Elliot, 85 Fed. 832; Craine v. Same, id.; Lamont v. Same, id.; Metropolitan Life Ins. Co. v. Bowser, 20 Ind. App. 557, 50 N. E. Rep. 87.

[3] Heaney v. Butte, etc. Co., 10 Mont. 590, 27 Pac. Rep. 379.

[4] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. Rep. 20–32.

[5] Wetzstein v. Boston & M. Cons. C. & S. M. Co. (Mont.), 63 Pac. Rep. 799.

[6] McLaughlin v. Kelly, 23 Cal. 212.

[7] *Ante*, § 1070.

[8] Fuller v. Swan River P. M. Co., 12 Colo. 12, 19 Pac. Rep. 886; Carson v. Hayes (Oreg.), 65 Pac. Rep. 814.

[9] Clifton Iron Co. v. Dye, 87 Ala. 466, 6 S. Rep. 192.

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question the court should weigh the injury that may accrue to either party, and also to the public, by granting or refusing the injunction.[1]

Thus it is that not every supposed injury from the flow or deposit of debris or detritus merits the interposition of the court by injunction. A conscientious court of the vicinity will seldom be misled as to the propriety of granting or refusing an injunction, as the exigencies of the case seem to require. An example of this was shown in the Alabama case above cited. It was also well illustrated in a late case in the federal court, where a mill had not been used for a long time, and another one was established higher up on the same creek. The practice had been to settle the tailings so that the value of the water for mill use was lessened perhaps, but not destroyed. The comparative destruction in value was disputed. Judge Hawley, in refusing the injunction, uses these words: "It is well settled that a court of equity may grant or withhold its aid according to the particular facts and circumstances of each case. This being true, it naturally follows that its intervention ought not to be procured except by the presentation of a substantial case, where there is a clear and palpable violation of a right. Wherever it affirmatively appears that the plaintiff has been injured or damaged in his rights by the wrongful acts of the defendant, an injunction should be issued. Where some degree of injury has been shown, the court would naturally have the right to consider the probability of its continuance, and many cases might be found where it has been held that, if the injury seems likely to continue, the court may grant an injunction. If there was any satisfactory evidence that defendant had permitted the mud, sand, sediment, or tailings to flow down the stream from his mill in such quantities as to injure the plaintiff in the operation of its mill, and had taken no steps or precaution to prevent

[1] Wood v. Sutcliffe, 2 Sim. (N. S.) 293; McBryde v. Sayre, 86 Ala. 468, 163; Davis v. Sowell, 77 Ala. 262; 5 S. Rep. 791.
Torrey v. Railroad Co., 18 N. J. Eq.

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such flow, and claimed the right to continue so to do, this court would not hesitate to grant the injunction, although the injury to plaintiff was very slight, if there was a reasonable probability of its continuance or increase. But no authority has been cited which would justify this court in issuing an injunction in a case like this, where no injury has been occasioned, and no reasonable probability that any will occur, on the bare ground that some time in the future the defendant might change his mind and do some act which might result in an injury to the plaintiff."[1]

§ **1634. Laches.**— Laches is said to be abhorrent to equity, from which principle flows the doctrine that he who seeks the assistance of a court of equity must not sleep upon his rights. This rule is rigidly applied against one seeking the aid of the court by injunction after a long delay in asserting his rights.[2]

Article C.

Inspection and Survey.

§ 1637. Preliminary and general observations — State statutes constitutional.
1638. Statutes declaratory of equity powers.
1639. To obtain evidence to prepare case for trial, but not to engage in a mere speculative proceeding.

§ **1637. Preliminary and general observations — State statutes constitutional.**— In nearly all the precious-metal-bearing states are statutory provisions authorizing, under certain circumstances, an inspection and survey of under-

[1] Otaheite G. & S. M. Co. v. Dean, 102 Fed. Rep. 929, 934. See also McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881.

[2] Real del Monte M. Co. v. Pond G. & S. M. Co., 23 Cal. 82; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674; Mammoth Co.'s Appeal, 54 Pa. St. 183; Lyon v. Woodman (Emma Mine Case), 7 M. R. 493; Field v. Beaumont, 1 Swanst. Ch. 204; Clarke v. Hart, 6 H. L. Cas. 655; Parrott v. Palmer, 3 Myl. & K. 632; Klein v. Davis, 11 Mont. 155, 27 Pac. Rep. 511.

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ground workings or disputed premises; or where trespasses are alleged upon ore bodies the title to which is disputable. The Montana statute, which has received more consideration from the courts than any other that we are aware of, reads as follows: "The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury, or to quiet title, or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim, and make survey or measurement thereof, or of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action."[1]

Other states having similar statutes are mentioned, with the place where they are to be found, in the note.[2] It will be readily observed that all these statutes agree upon one proposition, namely, that an action must be pending at the time the application for survey is made. The Montana statute has been subjected to the charge of unconstitutionality, and successfully weathered the storm.[3]

§ 1638. Statutes declaratory of equity powers.— These statutes are merely declaratory of an inherent power of a court of equity long recognized in England and in this country.[4] The power has been recognized by all writers on

[1] Code of Civ. Proc. Mont., § 1814.

[2] Arizona, Rev. Stat. 1901, §§ 3256–57; California, Code C. P., §§ 742–48; Colorado, Mills' Ann. Stats., §§ 3164, 3176; Montana, Code C. P., §§ 1314, 1315; Nevada, Comp. Laws 1900, by Cutting, § 252; New Mexico, Sess. Laws 1897, p. 206; North Dakota, Rev. Code 1895, § 1442; South Dakota (see Comp. Laws Dakota, made applicable), § 2014; Utah, R. S. 1898, §§ 3515, 3516.

[3] St. Louis M. & M. Co. v. Montana Co., 9 Mont. 228, 23 Pac. Rep. 510; Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 38 L. ed. 398. See also State v. Court (Mont.), 65 Pac. Rep. 1020.

[4] Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 161, 38 L. ed. 399; Lonsdale v. Curwen, 3 Bligh. 168; Kynaston v. East India Co., 3 Swanst. 249; State v. Seymour, 35 N. J. L. 47, 53; Winslow v.

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mining law who have had occasion to touch upon the subject. Mr. Bainbridge says: "A court of equity, however, will grant an order for inspection on any reasonable grounds of suspicion. In one case an owner of coal mines showed good ground for supposing a trespass from neighboring coal owners, and was unable to ascertain in his own lands whether any such acts had been committed. An order was granted for inspecting the neighboring works, and another order was afterwards granted for the repair and ventilation of the mine. Any obstruction to a fair inspection will be ordered to be removed. In the case just cited the defendant had filled up certain passages with the refuse, and they were ordered to be opened out."[1] As said by the supreme court of the United States: "Inspection orders like this have been frequently made, sometimes under the authority of special statutes and sometimes by virtue only of the general powers of a court of equity."[2]

Judge Alexander W. Baldwin, presiding over the circuit court of the ninth circuit, uses these words: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof, for the purpose of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto, by means of the appliances in use at the mine? All analogies of equity jurisprudence favor the affirmation of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect

Gifford, 6 Cush. 327; Walker v. Fletcher, 3 Bligh, 173; Blakesley v. Whieldon, 1 Hare, 176; Lewis v. Marsh, 8 Hare, 97; Bennett v. Whitehouse, 28 Beav. 119; Thomas Iron Co. v. Allentown M. Co., 28 N. J. Eq. 77; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Thornburgh v. Savage M. Co., 7 Morr. 667, 23 Fed. Cas. 1113; Whaley v. Braucker, 10 L. T. (N. S.) 155; Bennett v. Griffiths, 30 L. J. Q. B. 98; Henszey v. Coal Min. Co., 30 Fed. Rep. 179.

[1] Bainb. Mines, pp. 519, 520; Lonsdale v. Curwen, 3 Bligh, 168. See also McSwinney, Mines, 541, 542; Stewart, Mines, 245; Lindl. Mines, 1137.

[2] Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, and cases.

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justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action has the power to enforce an order of this kind will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where without it the trial would be a silly farce. Take as an illustration the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered, except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth of the issue between the parties."[1]

§ 1639. To obtain evidence to prepare case for trial, but not to engage in a mere speculative proceeding.— The foundation of this rule is not difficult of ascertainment. Secret underground workings are being excavated, and independent of any statute there would be a monstrous wrong without a remedy if courts did not assert their inherent authority in a proper case. But wherever evidence and knowledge are necessary as to exact facts, the court will generally, and in a proper case, grant the order. It was said by an English court in a leading case: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do."[2] And again by Lord Cockburn, C. J.: "The power to order an inspection of real or personal prop-

[1] Thornburgh v. Savage M. Co., 23 Fed. Cas. 1113.

[2] Lewis v. Marsh, 8 Hare, 97, quoted in Montana Co. v. St. Louis M. & M. Co., 152 U. S. 166. See also Whaley v. Braucker, 10 L. T. (N. S.) 155.

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erty has long existed in the courts of equity, and we find that, as ancillary to that power, the courts of equity have ordered the removal, where necessary, of obstructions to the inspection."[1]

But not every attempt at interference with private rights presents a case for interference. In a recent case in Montana where the surface rights consisted of only two small wedge-shaped pieces, only one of which was claimed to have a portion (about fifty feet) of the apex, the trial judge granted an order to survey underground the full size of a claim fifteen hundred by six hundred feet, the lines being thus laid over patented ground for this purpose. And in a writ in the nature of prohibition under the supervisory power of the supreme court, that court reversed his action, and in the course of its opinion enunciated the entire controlling doctrine in these words: "The sections of the statute go no further than to declare the rule as it has existed for many years, except that by their terms they extend the rule to all courts, whether sitting as courts of law or equity. It is not our present purpose, however, to discuss the propriety of the legislation. We refer to the statute, and the cases in which the rule has been applied, to show that the district court had ample authority to make the order in question, provided the facts presented at the hearing justified it. Indeed, the order, upon proper showing, is always made almost as a matter of course. The purpose of the statute is to serve the interest of justice, however, and not to be made an instrument of injustice or oppression. Under it the court may not, without a reasonable showing, and in disregard of the rights of the party in possession of the property, or in control of the means of access to it, permit his adversary to enter upon it, merely because he desires and asks for an order permitting him to do so. The law must be administered in the spirit of liberality to accomplish the desired end. Purely technical and captious objections should

[1] Bennett v. Griffiths, 30 L. J. Q. B. 98.

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not be tolerated. The language of the statute is, 'for good cause shown,' and, under the rule laid down in a former case,[1] whenever the order is made without good cause, it must follow that it is an infringement on the rights of the party in possession, and may be set aside as unauthorized; otherwise the power of the court could be exercised without restraint and to the great injury and oppression of the party in possession."[2]

[1] St. Louis M. & M. Co. v. Montana Co., 9 Mont. 228, 23 Pac. Rep. 510.

[2] State v. District Court, 65 Pac. Rep. 1020, 1023.

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PART XV.

OF SPECIAL STATUTORY PROVISIONS FOR HEALTH AND SAFETY OF MINERS, AND REGULATING RIGHTS AND DUTIES OF EMPLOYER AND EMPLOYEE.

CHAPTER I.

GENERAL HEALTH AND SAFETY STATUTES.

§ 1640. Special statutory provisions for the protection of miners and regulating mining — General health and safety statutes.
1641. When courts will not question legislative power.
1642. Police regulations — Legislative power — Injunction by the state.
1643. Proper subjects of police regulation.

§ 1640. Special statutory provisions for the protection of miners and regulating mining — General health and safety statutes.— In nearly all coal-mining states of this country, and in England, statutory enactments have been made. These are police measures, and are enacted generally as health and safety provisions regulating the operation of mines in respect to those matters which experience has demonstrated to be essential. Lack of space forbids the insertion of all these police regulations, either here or in the Appendix; besides, it is believed that no good purpose could be subserved by repeating them at length, or even their substance. At this writing (1901) they are to be found under the heads indicated in the note.[1] The decisions upon these

[1] *England:* Coke's English Statutes, tit. "Mines and Quarries," pp. 1–56; Metalliferous Mines Regulation Act (1872), 35 & 36 Vict., ch. 77; Act of same title (1875), 38 & 39 Vict., ch. 39; Coal Mines Regulation Act (1887), 50 & 51 Vict., ch. 58; Quarries Act, etc. (1894), 57

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statutes are numerous, and the policy of the law is generally upheld and obedience enforced, and in this country it may be said that they are within the legislative power of the state.[1]

& 58 Vict., ch. 42; Coal Mines (Check Weigher) Act (1894), 57 & 58 Vict., ch. 52.

United States: Act March 3, 1891, 1 Supp. R. S. U. S. 948.

Alabama: Sess. Laws 1893, 607; Id. 1895, 1230.

Arkansas: Act April 4, 1893, Sess. Laws 1893, p. 213.

California: Act March 8, 1893, Sess. Laws 1893, p. 82.

Colorado: Act April 8, 1893, p. 347.

Idaho: Act March 6, 1893, Sess. Laws 1893, p. 152; Sess. Laws 1895, p. 160.

Illinois: 2 Starr & Curtis, Ann. Stat., ch. 93, Laws 1891.

Indiana: Horner, Rev. Stat. 1896, secs. 5458–80, 7473–81.

Iowa: Rev. Code 1888, p. 588; Laws 1890, p. 71.

Kansas: Gen. Stat. 1889, §§ 3830–32, 3846–61, 6467; Laws 1891, p. 270; 1893, p. 271; 1895, p. 312.

Kentucky: B. & C. Stat., §§ 2722–2739.

Michigan: 3 How. Ann. Stat. 2287.

Missouri: Stats. 1889, §§ 7061–77; 1891, p. 182; 1893, p. 209; 1895, pp. 225, 226, 228.

Montana: Pol. Code, 1895, §§ 580, 590, 3350–54; Crim. Code, 1895, §§ 474, 704, 508–22; Laws 1897, pp. 66, 245, 109.

Nevada: Comp. Laws, 1900 (Cutting), §§ 271–280.

New Mexico: Comp. Laws 1884, §§ 1575–85.

New York: Laws 1883, ch. 356; 1890, ch. 394; 1892, ch. 67; Laws 1893, p. 339; Laws 1895, pp. 324, 670, 765.

Ohio: Rev. Stat. 1890, §§ 290, 306, 6871; Laws 1888, p. 396; 1889, p. 377; 1891, p. 160.

Pennsylvania: Act June 2, 1891, Laws 1891, p. 176; 1893, p. 52; July 15, 1897.

South Dakota: Laws 1890, ch. 112.

Tennessee: Code 1884, §§ 306–7.

Utah: R. S. 1898, §§ 1507–34; §§ 1538–40.

Washington: Stats. 1891, §§ 2217–40, 2263–71; Laws 1897, p. 58.

West Virginia: Code 1891, pp. 991–96.

Wisconsin: Laws 1891, p. 126.

Wyoming: R. S. 1899, § 2557 *et seq.*

[1] Howells v. Wynne, 15 C. B. (N. S.) 3, 32 L. J. C. P. 241, 9 Jur. (N. S.) 1041; Reg. v. Brown, 7 El. & Bl. 755, 26 L. J. M. C. 183, 3 Jur. (N. S.) 745; Dunston v. Stewart, 6 Vict. Law Rep. 175; Foster v. North Hendre M. Co., 1 Q. B. 71; Foster v. Owen, 62 L. J. M. C. 7, 67 L. J. 712; Knowles v. Dickinson, 29 L. J. M. C. 135; Holt v. Hopwood, 40 L. T. 797; Stott v. Dickenson, 34 L. T. 291; Evans v. Mostyn, 2 C. P. D. 547, 47 L. J. M. C. 25; Nethersol v. Bourne, 14 App. Cas. 228; Niantic Coal M. Co. v. Leonard, 126 Ill. 216, 19 N. E. Rep. 294; Cons. Coal Co. v. Maehl, 130 Ill. 551, 22 N. E. Rep. 715; Catlett v. Young, 143 Ill.

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§ 1641. When courts will not question legislative power.— The question whether any particular regulation is in excess of legislative power is *prima facie* one for the legislature itself, and courts will not interfere unless the province of the legislature has been manifestly transcended.[1] Such laws are within the general powers of the state so long as they do not conflict with the federal constitution; and presumptions are in favor of their validity.[2]

§ 1642. Police regulations — Legislative power — Injunction by the state.— These statutes, as we have already observed, may be generally regarded as police regulations, involving the power of the legislature, especially in this country, to enact the legislation; that the legislature in most of the states has power to pass laws for the general health and safety of persons engaged in, or connected with, mining may be said to be well settled.[3] In the Illinois case, the one mentioned first in the note, the contention was that the statute providing for a check-weighman was obnoxious to the provision of the constitution against class legislation, and was not "due process of law." The court, however,

74, 32 N. E. Rep. 447; Shell v. People, 93 Ill. 129: Sangamon Coal M. Co. v. Wiggerhaus, 65 Ill. App. 77, 122 Ill. 279; Daniels v. Hilgard, 77 Ill. 640; Springside Coal M. Co. v. Grogan, 53 Ill. App. 60; Muddy Valley M. & M. Co. v. Phillips, 39 Ill. App. 376; Chicago W. & O. Coal Co. v. People, 181 Ill. 270, 54 N. E. Rep. 961; Fell v. Rich Hill Coal M. Co., 23 Mo. App. 216; Leslie v. Rich Hill Coal M. Co., 110 Mo. 31; State v. Anaconda C. Co., 23 Mont. 498, 59 Pac. Rep. 854; Durkin v. Kingston Coal Co., 171 Pa. St. 193; Northumberland County v. Zimmerman, 75 Pa. St. 76.

[1] Daniels v. Hilgard, 77 Ill. 640.

[2] Davock v. Moore, 105 Mich. 132, 63 N. W. Rep. 424; Burrows v. Delta Trans. Co., 106 Mich. 594, 64 N. W. Rep. 501: People v. Smith, 108 Mich. 527, 66 N. W. Rep. 382.

[3] Millett v. People, 117 Ill. 294, 7 N. E. Rep. 631; Shell v. People, 93 Ill. 129; People v. Petherman, 64 Mich. 252; Commonwealth v. Conyngham, 66 Pa. St. 99; Hamilton v. State, 102 Ill. 369; Warren v. Sohn, 112 Ind. 213, 13 N. E. Rep. 863; State v. Anaconda Copper Co., 23 Mont. 498, 59 Pac. Rep. 854; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. Rep. 809, 150 Ind. 698, 50 N. E. Rep. 1125; affirmed, Ohio Oil Co. v. Indiana, 177 U. S. 190

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while reversing the case upon other grounds, upheld the statutes as bearing equally upon all who come within its terms.

In the Montana case was involved the question as to the validity of a state statute requiring the use of safety cages and a "bonnet" over all cages used in shafts of a greater depth than three hundred feet, the purpose of which was to prevent miners from falling off the cages, and to prevent any loose article in the shaft from falling on them, and the law, although attacked for unconstitutionality, was upheld.

In the Indiana case was involved the validity of a statute requiring the prevention of the escape and wasting of gas in all gas wells. The statute was attacked as an unwarranted interference with private property, and the law was upheld both by the state court and the supreme court of the United States, and it was further held that the state was not limited to the penal feature and punishment by fine, but might enforce obedience by injunction.

§ 1643. Proper subjects of police regulation.— In Indiana a statute regulating the pressure of natural gas transported in pipes to not to exceed three hundred pounds pressure to the square inch was upheld by the supreme court of that state in this language: "We come now to a consideration of the question of the inherent dangerous qualities of natural gas as affecting the power of the state to regulate its use. We have already declared that it is a dangerous substance, requiring regulation, and we shall only add, to what we have said, a quotation from the opinion in the Missouri case:[1] 'It was unnecessary,' said the court, 'to aver that coal oil is inflammable or to prove it. Courts and juries will take cognizance of such matters as are of common knowledge, and pertain to the experience and affairs of almost every man's daily life. Courts do not require proof that fire will burn or powder explode, or gas illuminate, or that many other processes in nature and art produce

[1] State v. Hayes, 78 Mo. 307.

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certain known effects.'[1] As natural gas is dangerous, it is a proper subject for police regulation, and the affirmation of this proposition is a sufficient refutation of appellee's argument that it may be assumed that the statute, under guise of the police power, attempts to regulate interstate commerce, and thus usurp a federal power. What the rule would be if natural gas were an article not dangerous, such as corn, wheat, or the like, we need not inquire, since the record does not present any such question."[2]

[1] 1 Greenl. Ev., § 56; Brown v. Piper, 91 U. S. 87, 23 L. ed. 200; Udderzook's Case, 76 Pa. St. 340; Garth v. Caldwell, 72 Mo. 622; Nagel v. Mo. Pac. R. Co., 75 Mo. 665, 666.

[2] Jamieson v. Indiana Nat. Gas & Oil Co., 128 Ind. 555, 28 N. E. Rep. 76. See also Maple v. John, 42 W. Va. 80, 24 S. E. Rep. 603; Ohio Oil Co. v. Indiana, 177 U. S. 190; Id., 212, 213; State v. Ohio Oil Co., 150 Ind. 21, 698, 49 N. E. Rep. 809, 50 N. E. Rep. 1125; State v. Indiana & Ohio Oil, Gas & M. Co., 120 Ind. 575, 22 N. E. Rep. 778; People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. Rep. 59; Townsend v. State, 147 Ind. 624, 49 N. E. Rep. 14; Brown v. Vandergrift, 80 Pa. St. 142; Jones v. Forest Oil Co., 194 Pa. St. 379, 44 Atl. Rep. 1074; Hague v. Wheeler, 157 Pa. St. 324, 27 Atl. Rep. 719.

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CHAPTER II.

OF STATE STATUTES.

ARTICLE A.

Statutes Generally Considered.

§ 1650. Special statutory provisions—Subjects of statute.
1651. Exception when applied to fellow-servants.
1652. Where new outlets required in old mine—Sufficient man-way question for jury.
1653. Second opening.
1654. Mine boss—Fellow-servant—Separate openings.
1655. Ventilation in coal mines.
1656. The English rule—Suspension of work.

§ 1650. Special statutory provisions—Subjects of statute.—Pursuing this principle, the legislature may provide for fencing or otherwise protecting the mouth of the shaft, incline or other dangerous opening.[1] It may also provide for and require the opening and maintenance of man-ways, escapement shafts and other means of ingress and egress separate from the main working openings,[2] and may provide for and require proper inspection, including the employment of a special inspector or mine boss.[3] It may also require the observance of proper regulations against damps

[1] Catlett v. Young, 143 Ill. 74, 32 N. E. Rep. 447; Bartlett C. & I. Co. v. Roach, 68 Ill. 174; Catlett v. Young, 38 Ill. App. 198; Springside Coal M. Co. v. Grogan, 53 Ill. App. 60; Spiva v. Osage Coal M. Co., 88 Mo. 68; Wiggins v. Henderson, 22 Nev. 103, 36 Pac. Rep. 459; Duke of Devonshire v. Stokes (Q. B.), 76 Law T. Rep. 424.

[2] Haddock v. Com., 103 Pa. St. 243, reversing 1 Luzerne Leg. Reg. 320; Com. v. Reynolds, 1 Luzerne Leg. Reg. 218; Loose v. People, 11 Ill. App. 448; Com. v. Bonnell, 8 Phil. 434; Hamilton v. State, 102 Ill. 367; McDonald v. Rock Hill I. & C. Co., 185 Pa. St. 1; Chicago W. & V. Coal Co. v. People, 181 Ill. 270, 54 N. E. Rep. 961.

[3] Victor Coal Co. v. Muir, 20 Colo. 220, 38 Pac. Rep. 378; Kellyville Oil Co. v. Hill, 87 Ill. App. 424; Daniels v. Hilgard, 77 Ill. 640; Shell v. People, 93 Ill. 129; Woodruff v. Kellyville Coal Co., 182 Ill. 480, 55 N. E. Rep. 550; Pawnee Coal Co. v. Royce, 56 N. E. Rep. 621; Con. C. Co. v.

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and gases, and proper inspection for the purpose of preventing their accumulation.[1] It may also prohibit the wasting of gas, and provide against the employment of women, or male persons under a certain age.[2]

§ 1651. Exception, when applied to fellow-servants.— But the Pennsylvania act of March 3, 1870, providing for the fencing off of dangerous machinery in mines, imposes no liability on the part of the master, where proper protection was made, and the plank was removed by a co-employee.[3] This, of course, upon the familiar principle that, the delict being that of a fellow-servant, the master was not liable.

§ 1652. Where new outlets required in old mine — Sufficient man-way question for jury.— Where an old mine has

Schiller, 42 Ill. App. 619; Linton C. & M. Co. v. Persons, 11 Ind. App. 264, 39 N. E. Rep. 214; State v. Anaconda Copper M. Co., 23 Mont. 498, 59 Pac. Rep. 854; Commonwealth v. Reynolds, 1 Kulp, 218; Commonwealth v. Conrad, 3 id. 381; Commonwealth v. Hutchison, 4 C. C. R. 18; Commonwealth v. Wigton, 12 Penn. C. C. R. 55, 2 Dist. Rep. 51; Commonwealth v. Waddell, 6 Kulp, 95; Delaware & Hudson Canal Co. v. Carroll, 89 Pa. St. 374; Redstone Coke Co. v. Roby, 115 Pa. St. 364, 8 Atl. Rep. 593; Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. Rep. 49; Graham v. Newberg Orrel C. & C. Co., 38 W. Va. 273, 18 S. E. Rep. 584; Brough v. Homfray, L. R. 3 Q. B. 771, 37 L. J. M. C. 177.

[1] Deserant v. Cerrillos Coal R. Co., 20 Sup. Ct. Rep. 967, 178 U. S. 409; Sommer v. Carbon Hill Coal Co., 89 Fed. Rep. 54; Mosgrove v. Zimbleman Coal Co., 110 Iowa, 169, 81 N. W. Rep. 227; Coalrun Coal Co. v. Jones, 127 Ill. 379, 8 N. E. Rep. 865; Muddy Valley M. & M. Co. v. Phillips, 39 Ill. App. 376; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. Rep. 809; People's Gas Co. v. Tyner, 131 Ind. 281, 31 N. E. Rep. 60; Townsend v. State, 147 Ind. 624, 47 N. E. Rep. 19; Krause v. Morgan, 53 Ohio St. 26; Commonwealth v. Tompkins, 1 L. L. R. 341; Commonwealth v. Conrad, 14 id. 311; Commonwealth v. Bonnell, 8 Phil. 534; Com. v. Wilkesbarre Coal Co., 29 Leg. Int. 213; Haddock v. Commonwealth, 103 Pa. St. 243; Coal Creel M. Co. v. Davis, 90 Tenn. 711; Graham v. Newburg Orrel C. Co., *supra;* Hall v. Hopwood, 49 L. J. N. C. 17, 41 L. T. (N. S.) 797; Reg. v. James, 8 Car. & P. 131; Brough v. Homfray, L. R. 3 Q. B. 771; Knowles v. Dickinson, 2 El. & El. 705.

[2] Reg. v. Handley, 9 L. T. (N. S.) 827. See also State v. Ohio Oil Co., 150 Ind. 21, 698, 49 N. E. Rep. 809, 50 N. E. Rep. 1125, 177 U. S. 190.

[3] Honor v. Albrighton, 93 Pa. St. 475.

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the statutory outlets, and is then worked several hundred feet further along the seams, it then becomes a new mine, and an outlet for ventilation and escape is required by the Pennsylvania act of 1870.[1] In an action for death by negligence the question whether a man-way required by the Pennsylvania act of April 18, 1870, is sufficient, is one for the jury.[2]

§ 1653. Second opening.— In cutting the second opening required by the third section of the act of March 3, 1870, the production of coal for market by the men authorized or employed for the purpose of cutting said opening is not permitted by the act, except so far as it is incident to driving on through a seam or stratum towards a second outlet.[3]

§ 1654. Mine boss — Fellow-servant — Separate openings.— In Pennsylvania a mining boss is a fellow-servant of a miner working in a mine, and the company employing him is therefore not liable for the death of such miner from an explosion caused by the negligence of such boss in failing to properly ventilate.[4] So, the statute of Pennsylvania passed June 30, 1885, requiring the employment of a competent mining boss in each mine, only requires such boss to be employed for each general system and not for each of several drifts or openings in the same property the coal from which is taken out through one general entrance.[5]

§ 1655. Ventilation in coal mines.— The supreme court of the United States, construing the act of congress[6] requiring the owners or managers of coal mines in the territories of the United States, of the depth of one hundred feet or more, to provide an adequate amount of ventilation of not

[1] Com. v. Wilkesbarre C. Co., 29 Phila. Leg. Int. 213, 15 M. M. Rep. 81.

[2] Cambria Iron Co. v. Shaffer (Pa. St.), 8 Atl. Rep. 204.

[3] Com. v. Bonnell (Pa.), 8 Phila. 534.

[4] Delaware & H. C. Co. v. Carroll, 89 Pa. St. 374; Redstone Coke Co. v. Roby, 115 Pa. St. 364; Waddell v. Simonson, 112 Pa. St. 567, 4 Atl. Rep. 725.

[5] Serfass v. Driesbach (Pa. Com. Pl.), 12 Pa. Co. C. Rep. 60.

[6] Act of March 3, 1891, 26 Stat. at L., p. 1105; sec. 6, 2 Supp. R. S. U. S. 948.

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less than fifty cubic feet of air per second for each fifty men at work in the mine or drift, holds that its provisions are imperative; and in an action for the death of a coal miner, resulting from an explosion in the mine, the management cannot escape liability because some workman has disregarded instructions. In such case the privilege of determining the reasonableness or sufficiency of the ventilation is not given to the employer, but the provisions of the statute must be complied with.[1]

§ 1656. The English rule—Suspension of work.—Under the English statute[2] requiring ventilation constantly if colliery be worked, the suspension of actual work from Saturday to Monday will not suspend the requirements as to ventilation during that time.[3]

Article B.

As Affecting Liability for Negligence, and Herein of Contributory Negligence.

§ 1661. Increasing liability for negligence — Competent fellow-servants — Timbering — Special cases — Signals.
1662. Same — An example.
1663. Power of company to frame rules.
1664. Contributory negligence.
1665. The rule in Pennsylvania.

§ 1661. Increasing liability for negligence — Competent follow-servants — Timbering — Special cases — Signals. So the legislature, generally, may enforce the observance, on the part of the master, of all those special duties toward the servant which experience has proved to be essential for the servant's welfare; not leaving him solely to his civil remedy, but, as a means of enforcing precautionary meas-

[1] Deserant v. Cerrillos Coal Co., 178 U. S. 409, 20 Sup. Ct. Rep. 967, reversing s. c., 9 N. Mex. 495, 49 Pac. Rep. 807.

[2] 18 & 19 Vict., ch. 108, § 4.

[3] Knowles v. Dickinson, 2 Ell. & Ell. 705, 6 Jur. (N. S.) 678.

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ures, enhancing his right to recover for a breach of statutory duty, in addition to those duties which the common law imposes, a breach of which is negligence.[1] These duties required by statute, it seems, must be performed at all events, and even where there might be co-acting contributory negligence, if the efficient cause of any injury is traceable to the violation of the statute, the servant has a cause of action.

These statutes are most salutary in their purpose, throwing as they do further and proper safeguards around the miner; the frailty of human nature and the desire for employment as a means of obtaining a livelihood on the one side, and the cupidity of employers on the other, sometimes require additional restraints to those furnished by the common-law action for personal injury. Thus, these statutes, speaking from the experience of many states, are quite extensive in detail, covering many protective provisions for the health and safety of miners, and which local and sometimes general experience has found necessary.

It is believed that specification of particular provisions is more the work of a treatise upon master and servant, or upon negligence, than upon mining law; but we observe in passing that among the questions met and provided for by statute are those of employment of competent servants in

[1] Cons. Coal Co. of St. Louis v. Maehl, 180 Ill. 551, 22 N. E. Rep. 715; Niantic Coal & M. Co. v. Leonard, 126 Ill. 216, 19 N. E. Rep. 294; Litchfield v. Taylor, 81 Ill. 590; Chicago & V. C. Coal Co. v. Peterson, 39 Ill. App. 114; Cons. Coal Co. of St. Louis v. Scheller, 42 Ill. App. 619; Girard Coal Co. v. Wiggins, 52 Ill. App. 69; Coalrun Coal Co. v. Jones, 19 Ill. App. 365; Sangamon Coal M. Co. v. Wiggerhaus, 129 Ill. 279, 13 N. E. Rep. 648; Cons. Coal Co. of St. Louis v. Bokamp, 75 Ill. App. 605; Crabell v. Wapello Coal Co., 68 Iowa, 751, 28 N. W. Rep. 56; Ashland C. I. & Ry. Co. v. Wallace's Adm'r, 101 Ky. 626, 43 S. W. Rep. 207; Spiva v. Osage Coal & M. Co., 88 Mo. 68; Durant v. Lexington Coal M. Co., 97 Mo. 62, 10 S. W. Rep. 484; Leslie v. Rich Hill Cons. M. Co., 110 Mo. 31; State v. Anaconda Copper Co., 23 Mont. 498, 59 Pac. Rep. 854; Honor v. Roberts, 5 L. L. R. 9; Redstone Coal Co. v. Roby, 115 Pa. St. 364; Mulhern v. Lehigh Coal Co., 161 Pa. St. 270; Graham v. Newburg Orrel C. & C. Co., 38 W. Va. 273, 18 S. E. Rep. 584.

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particular places,[1] of providing for signals in proper cases,[2] of forbidding servants to ride on cars in certain places,[3] of providing proper safety cages,[4] of lighting,[5] of properly, and in a particular manner, propping the roof of coal mines,[6] of proper ventilation,[7] and many other subjects, only a few of which can be specially noticed in this work, it being our purpose to demonstrate general rules rather than specific local statutory provisions.

§ 1662. Same—An example.—The Missouri act of March 23, 1881 (Laws 1881, p. 165), required the owner or operator of a coal mine operated by shaft to provide safe means of hoisting and lowering persons in a cage covered with boiler-iron, "so as to keep safe as far as possible persons descending into and persons ascending out of such shaft." In an action against the company for an injury to a cager caused by the dropping of a lump of coal on him while engaged in loading cars on to the cage, the cage not being covered with boiler-iron, it was held that the injury was one intended to be guarded against by the statute, and the company was liable.[8]

§ 1663. Power of company to frame rules.—Where power is given by statute to frame rules for the government of persons employed in or about a mine the employee is bound by such rules, even after his discharge, though such discharge took place in the mine; and for any injury resulting from a violation of such rules by the discharged employee the master is not liable.[9]

[1] Cons. Coal Co. of St. Louis v. Maehl, 130 Ill. 551; Niantic Coal & M. Co. v. Leonard, 126 id. 216.

[2] Sangamon Coal M. Co. v. Wiggerhaus, 122 Ill. 279.

[3] Crabell v. Wapello Coal Co., 68 Iowa, 751.

[4] Cons. Coal Co. of St. Louis v. Maehl, *supra*; State v. Anaconda Copper Co., 23 Mont. 498.

[5] Cons. Coal Co. of St. Louis v. Maehl, *supra*.

[6] Ashland C. I. & Ry. Co. v. Wallace's Adm'r, 101 Ky. 626.

[7] Graham v. Newburg Orrel C. & C. Co., 38 W. Va. 273.

[8] Durant v. Lexington Coal Co., 97 Mo. 62. See also Litchfield Coal Co. v. Taylor, 81 Ill. 590.

[9] Higham v. Wright, 2 L. R. 2 C. P. Div. 397, 10 M. R. 24.

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§ 1664. Contributory negligence.— Whether these statutes change the rule as to contributory negligence seems not well settled, some cases holding that in no case should a recovery be allowed under a special statute where the servant is guilty of such contributory negligence as that the accident is traceable to that as the proximate or efficient cause,[1] while other authority holds that the mine owner cannot evade responsibility for a wilful violation of the statute upon any theory of contributory negligence. Thus, in Illinois, in an action against defendant for the death of plaintiff's intestate, caused by the alleged violation of a statute requiring the top of the shaft to be fenced, the supreme court, speaking through Baker, J., said: "The question raised by the rules of the trial court . . . , and the principal question at issue between the parties to this suit, is whether or not, in a suit prosecuted under section 14, above quoted, for an injury to person or property for a loss of life, or a wilful violation of any of the requirements of the act providing for the health and safety of persons employed in coal mines, or a wilful failure to comply with any of its provisions, it devolves upon plaintiff to allege and prove exercise of ordinary care on his part, or on the part of the deceased, and whether or not contributory negligence on his part or on the part of the deceased will preclude a recovery. . . . The present statute, so far as the question now under consideration is affected, is substantially the same as that of 1872. When the legislature, in 1879, re-enacted, in substance, the act of 1872, and re-enacted in the same language section 14, which gives the right of action, it must be regarded that it acted in view of interpretation that more than three years before had been placed

[1] Reese v. Biddle, 112 Pa. St. 72; Waddell v. Simonson, 112 Pa. St. 567; Howells v. Landore Siemens Steel Co., L. R. 10 Q. B. 62, 32 L. T. (N. S.) 19; Delaware & H. Canal Co. v. Carroll, 89 Pa. St. 374; Redstone Coke Co. v. Roby, 115 Pa. St. 364; Lineoski v. Susquehanna Coal Co., 157 Pa. St. 153; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Krause v. Morgan, 53 Ohio St. 26, 40 N. E. Rep. 886.

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by the court upon said act of 1872 and upon said section 14, and intended that, in case of injuries occasioned by any wilful violation of the act of 1879, or by wilful failure to comply with any of its provisions, the right of recovery should not depend upon the exercise of ordinary care of the person injured or the deceased, or be precluded by contributory negligence. . . . In our opinion it was not error to refuse to instruct the jury that if they believed from the testimony that the defendant, in good faith, for the protection of the entrance boarded and fenced it, and arranged the car and operation of it to act as a gate or covering for the shaft, and that such protection was sufficient to protect a person in the exercise of the care that a person of ordinary care should, under the circumstances, exercise, from falling into the shaft, then the act of the defendants was not wilful, and the verdict should be for them. That which the statute required was that the top of the shaft should be securely fenced by gates, properly covering and protecting the shaft and entrance thereto. As was said in a previous case,[1] the very object to be obtained by the statute was to prevent injuries to persons employed in coal mines, so that the negligence on their part in the manner of doing their work should not prove fatal. . . . By the hypothesis of the instruction no liability is imposed by the statute upon the mine owner, if the party injured or killed could, by the exercise of what would be ordinary care in view of all the circumstances, avoid the injury, no matter how entirely insufficient the covering and protection to the shaft and the entrance thereto. This is placing a construction on the statute that would render it ineffectual to accomplish the objects that it was intended should be accomplished."[2]

[1] Bartlett C. & M. Co. v. Roach, 68 Ill. 174.

[2] Catlett v. Young, 143 Ill. 74, 32 N. E. Rep. 447. See also Woodruff v. Kellyville Coal Co., 55 N. E. Rep. 550; Litchfield Coal Co. v. Taylor, 81 Ill. 590; Illinois Fuel Co. v. Parsons, 38 Ill. App. 182; Pawnee Coal Co. v. Royce, 56 N. E. Rep. 621; Mosgrove v. Zimbleman Coal Co., 110 Iowa, 169, 81 N. W. Rep. 227; Eureka Ext. Co. v. Allen, 9 Vict.

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§ 1665. The rule in Pennsylvania.— Injuries received by a coal miner having been caused proximately by his own negligence, his right of action against the mine owner therefor is not supported by proof of the defendant's violation of the provisions of the act of June 30, 1885, when such violation in no way proximately caused or contributed to the injuries.[1] But, of course, as we have seen, if the violation of statute furnishes the proximate and efficient cause of the injury, the converse of the proposition above stated becomes true, and the master is liable.

ARTICLE C.

Protection as to Earnings — Weighing.

§ 1670. Protection as to earnings — Weighing — Credit for coal.
1671. A proper protection to miners.
1672. Contrary doctrine.
1673. Proper police regulation — Statute generally upheld.
1674. Same — Constitution the highest authority — No superior natural right.
1675. Same — Right to have weighed in original form.

§ 1670. Protection as to earnings — Weighing — Credit for coal.— Safeguards may also be provided whereby the miner will secure intact the enjoyment of his earnings, and to this end provision may be made for the proper weighing of coal at the mine,[2] and punishments may be inflicted in a proper case for violation of the statute.[3] This duty involves not only properly weighing the coal, but likewise that the miner have proper credit on the books of the corporation or mine owner for the same.[4]

Law Rep. 341; Deserant v. Cerrillos Coal R. Co., 178 U. S. 409, reversing 9 N. Mex. 495, 49 Pac. Rep. 809; Foster v. Owen, 62 L. J. M. C. 7, 61 L. T. 72.

[1] Christner v. Cumberland & Elk L. C. Co., 146 Pa. St. 67. See also Beaucoup Coal Co. v. Cooper, 12 Ill. App. 373; Higham v. Wright, L. R. 2 C. P. Div. 397.

[2] Smith v. State, 90 Tenn. 575, 18 S. W. Rep. 248; State v. Jenkins, 90 Tenn. 580, 18 S. W. Rep. 249; Peel Splint Coal Co. v. State of West Virginia, 36 W. Va. 802, 17 L. R. A. 385; State v. Pasco (Ind.), 54 N. E. Rep. 802.

[3] State v. Pasco, *supra*.

[4] State v. Pasco, *supra*.

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§ 1671. A proper protection to miners.— The supreme court of appeals of West Virginia uses this language: "If such legislation, directed against one class of corporations only, is not objectionable as class legislation, it is difficult to see why laws directed against other corporations, and directly intended to prevent popular disturbance and discontent, by regulating the manner of weighing coal and prohibiting what is popularly known as the 'Pluck-me' method of payment, should not be deemed a legitimate exercise of the police power of the state."[1] Indiana also supports this general doctrine.[2]

§ 1672. Contrary doctrine.— But the supreme court of Illinois declared a statute of that state requiring the weighing of coal hoisted from mines, "whose product is shipped by rail or water," to be unconstitutional.[3] But the great weight of authority seems to regard such legislation as a proper exercise of police power and enforceable accordingly.

§ 1673. Proper police regulation — Statute generally upheld.—Pursuing the thought adverted to in the last section, it is proper to observe that the courts of West Virginia, Pennsylvania, Indiana and some others have generally upheld these statutes as a proper exercise of the police power. Speaking of the elementary principle this is manifestly true. Courts have not the right, from any abstract notions as to the policy of the law, to say that it is unconstitutional; they can only say so when the repugnancy to the constitution is apparent and the matter is not in doubt. It is a well settled proposition of constitutional law that the presumption is in favor of the constitutionality of a statute, and it is the

[1] Peel Splint Coal Co. v. West Virginia, 36 W. Va. 802, 17 L. R. A. 385, 391.

[2] Hancock v. Yaden, 121 Ind. 366, 23 N. E. Rep. 353.

[3] Harding v. People, 160 Ill. 459, 43 N. E. Rep. 624, 32 L. R. A. 445. See also Millett v. People, 117 Ill. 294, 7 N. E. Rep. 631.

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duty of the court to uphold its constitutionality, unless its repugnance is shown beyond all reasonable doubt.

The principle in hand was finely illustrated by the supreme court of West Virginia in an early case, where the controlling principles were collaborated in the following words: "It is the duty of a court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist, that no violation has been intended by the legislature, may require in some cases, where the meaning of the constitution is in doubt, to lean in favor of such a construction of the statute as might not, at first view, seem most obvious and natural. Where the meaning of the constitution is clear, the court, if possible, must give the statute such a construction as will enable it to have effect. It is always to be presumed that the legislature design the statute to take effect, and not be a nullity. Wherever an act of the legislature can be so construed and applied as to avoid a conflict with the constitution, and give it the force of law, such construction will be adopted by the court. The expediency or inexpediency of an act is a question for the legislature and not for the court. The judiciary cannot inquire into the motives and necessities which may have superinduced the passage of the act. The courts have no right to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their notions of natural right, absolute justice or sound morality."[1]

§ 1674. Same — Constitution the highest authority — No superior natural right. — So it may be considered as settled in this country by the highest authority on written constitutions that there is no right, natural or real, superior

[1] Slack v. Jacob, 8 W. Va. 612, quoted with approval in Peel Splint Coal Co. v. State, 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. Rep. 1000. See also Osborn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State v. Workman, 35 W. Va. 367, 14 L. R. A. 600, 14 S. E. Rep. 9.

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to the constitution itself, and no statute can be declared void out of any nice notions as to its policy; these questions are for the legislature. And the courts are confined in their inquiry by the sole question as to whether the act in question is contrary to the constitution, and this must clearly appear before the act can be said to be void. In one of the cases cited in the preceding section the controlling principle in hand was enunciated in the following words: "A further principle, at one time held in some doubt, but now, as we think, finally decided, is that the judiciary cannot annul or pronounce void any act of the legislature upon any other ground than that of repugnancy to the constitution. It was at one time supposed that the judiciary could resort to the principles of natural justice or common right, and pronounce a legislative act void because in conflict with such supposed principles. This view, however, I think we may regard as finally abandoned. In fact, one of our earliest writers upon this subject lays down the principle, which has been sanctioned and adopted by our own state, 'that, although an act of the legislature contrary to the first principles of the social compact is not rightful,— as, for instance, to make a man judge in his own cause; or seizing the property of the citizen honestly acquired, without compensation; or retrospective laws in general,— yet it seems the law cannot be declared void by a court of justice merely because it violates these general principles, if not prohibited by the constitution of the state in which it is passed, or of the United States.'[1] . . . It may be said, therefore, that the doctrine of a higher law than the constitution has no longer any foothold in American jurisprudence."[2]

§ 1675. Same — Right to have weighed in original form. The purpose of these statutes being to furnish a reliable means upon which to base the miner's compensation and to

[1] Sergeant, Const. Law, 348; Tiedeman, Pol. Pow., p. 7, sec. 2 and notes.

[2] Peel Splint Coal Co. v. State of West Virginia, 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. Rep. 1000. See

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protect him in the payment for all the coal he mines, he not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it.[1]

also Slack v. Jacob, 8 W. Va. 612; Commonwealth v. Perry, 155 Mass. 117, 14 L. R. A. 825, 28 N. E. Rep. 1126.

[1] Peel Splint Coal Co. v. State, 36 W. Va. 802; Smith v. State, 90 Tenn. 575, 18 S. W. Rep. 248.

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CHAPTER III.

MINERS' LIENS IN GENERAL.

ARTICLE A.

Scope of Treatment — Creature of Statute.

§ 1680. Scope of the chapter.
1681. Provided for in all the states.
1682. Creature of statute — A legislative mortgage.
1683. Mortgage and lien — Improvements.
1684. Labor statutes — Liens in consequence of.
1685. Distinction — Must have been located as a mining claim.

§ 1680. Scope of the chapter.— Miners' liens generally are so nearly like all other statutory liens that it is scarcely within the purposes of this work to go into any extensive discussion of the subject, but rather to limit it to a few special circumstances where the decisions of the courts have had special significance because the subject of the lien was mining property. We shall not discuss equitable liens in any form, as they have no place here. Nor will we discuss any special statutory provisions, because statutes are constantly being repealed and changed on this subject, so that it cannot now be said that the lien law has reached any settled and definite condition and status.

§ 1681. Provided for in all the states.— Without exception, it may be said, the legislation of all the states where mining is carried on, extends the right to the lien to all persons who, by virtue of a contract with the owner, shall perform any labor on any mine, tunnel, shaft or other workings, with much elaborateness of detail, not necessary to be noted here. Nor will a general examination of these statutory provisions be necessary, as they are constantly changing to the extent that it may be now said that the lien law of this

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country, as indicated in the last section, is still in its formative state. Generally it may be stated that the right to a lien is given to every person who performs labor on a mine, limited, of course, to the description of persons mentioned in the statute, where there is such description, but it generally extends to all persons.[1]

[1] In re Hope M. Co., 1 Sawy. 710, 12 Fed. Cas. 487, No. 6,681; Flagstaff S. M. Co. v. Cullins, 104 U. S. 176. See also United Mines Co. v. Hatcher, 79 Fed. Rep. 517; Central Trust Co. v. Sheffield Coal, Iron & Ry. Co., 42 Fed. Rep. 106; Eaman v. Bashford, and Hewitt v. Bashford, 37 Pac. Rep. (Ariz.) 24; Gardner v. Resumption M. & S. Co., 35 Pac. Rep. 674; Dickenson v. Bolyer, 55 Cal. 285; Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702; S. C., 36 Pac. Rep. 388; Jurgensen v. Diller, 114 Cal. 481, 46 Pac. Rep. 610; Palmer v. Uncas M. Co., 70 Cal. 614, 11 Pac. Rep. 666; Tredinnick v. Red Cloud Cons. M. Co., 72 Cal. 78, 13 Pac. Rep. 152; Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 18 Pac. Rep. 772; Bewick v. Muir, 83 Cal. 368, 23 Pac. Rep. 390; Sylvester v. Coe Quartz M. Co., 80 Cal. 510, 22 Pac. Rep. 217; Morse v. De Adro, 107 Cal. 622, 40 Pac. Rep. 1018; Fernandez v. Burleson, 110 Cal. 164, 42 Pac. Rep. 566; Ascha v. Fitch (Cal.), 46 Pac. Rep. 298; Barnard v. McKenzie, 4 Colo. 251; Keystone M. Co. v. Gallagher, 5 Colo. 23; Mellor v. Valentine, 3 Colo. 260; Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612; Bassick M. Co. v. Schoolfield, 10 Colo. 146, 14 Pac. Rep. 65; Folsom v. Cragen, 11 Colo. 205, 17 Pac. Rep. 515; Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. Rep. 433; Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458; Steel v. Argentine M. Co. (Idaho), 42 Pac. Rep. 585; White v. Mullins (Idaho), 31 Pac. Rep. 801; Hopkins v. Hudson, 107 Ind. 190; Shull v. Fontanet M. Ass'n, 128 Ind. 331, 26 N. E. Rep. 790; Warren v. Sohn, 112 Ind. 213, 13 N. E. Rep. 863; McLaren v. Byrnes, 80 Mich. 275, 45 N. W. Rep. 143; Allen v. Frumet M. Co., 73 Mo. 688; Smallhouse v. Kentucky & Montana G. & S. M. Co., 2 Mont. 443; Johnson v. Puritan M. & M. Co., 19 Mont. 30, 47 Pac. Rep. 337; Alvord v. Hendree, 2 Mont. 115, modified in Davis v. Alvord, 94 U. S. 545; Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72; Pelton v. Minia Cons. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; Beck v. O'Connor, 53 Pac. Rep. 94, 21 Mont. 109; Hunter v. Savage Cons. S. M. Co., 4 Nev. 153; Skyrme v. Occidental M. & M. Co., 8 Nev. 219; Capron v. Strout, 11 Nev. 304; Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751; Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30 (last case for ore hauling); Williams v. Toledo Coal Co., 25 Oreg. 426, 36 Pac. Rep. 159; Devine v. Taylor, 12 Ohio C. C. 723; Esterly's Appeal, 54 Pa. St. 192; Vandergrift's Appeal, 83 Pa. St. 126; Shinline's Appeal, 2 Walk. 325; Cullins v. Flagstaff S. M. Co., 2 Utah, 219.

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In all the cases cited in the note, miners' liens have been considered in their general aspect and have been declared prior as of date when the first labor or materials, as the case may be, were furnished upon the mine against which the lien was claimed.

§ 1682. Creature of statute — A legislative mortgage. The lien as it exists to-day is a legislative mortgage — a creature of statute,— and generally those who seek it must reasonably comply with the spirit and, by some decisions, the letter of the statute.[1] That is to say, as to the right the statute is liberally construed; but as to the remedy, those who seek to avail themselves of the right must strictly follow the statute.

§ 1683. Mortgage and lien — Improvements.— While the lien is superior, as of the date of the commencement of the labor or improvements, as to all subsequently created mortgages, a prior mortgage upon the land retains its priority as a lien, as to the land, but the lien holds priority over the mortgage as to the value of the improvements placed there by claimant, and to the extent thereof.[2]

§ 1684. Labor statutes — Liens in consequence of.— In many of the states there are lien statutes whereby the laborer is given a superior claim in the case of insolvency of a mine owner, generally extending to proceeds, but often to the improvements, and in some cases to the mine itself; while in still others, upon insolvency of the mine owner, the laborer or miner has been held entitled to a receiver-

[1] Ascha v. Fitch (Cal.), 46 Pac. Rep. 298.

[2] Johnson v. Puritan M. & M. Co., 19 Mont. 80, 47 Pac. Rep. 337, citing and following Opera House Co. v. Maguire, 14 Mont. 558, 37 Pac. Rep. 607; Montana L. & M. Co. v. Obelisk M. & C. Co., 15 Mont. 24, 37 Pac. Rep. 887; Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441; Davis v. Alvord, 94 U. S. 545; Conrad v. Starr, 50 Iowa, 470; Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72.

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ship. In all these cases following the letter of the statute, the laborer has a preferred claim.[1]

§ 1685. Distinction — Must have been located as a mining claim.— The California supreme court has arrived at the conclusion that the words "mining claim," used in the statute, are not sufficiently comprehensive to include a mine upon or in land patented as agricultural land or under a Mexican grant.[2] But the correctness of such narrow construction may be doubted, since a mine is a mine, in whatever ground or land it may be found. While these proceedings are *in invitum*, still, the general rule is that this applies more strongly to the proceedings upon declaring and foreclosing the lien than to the subject-matter of it.[3] While the court in the last case cited seems to review the question by attempting a reconciliation of its position in the various cases cited by the court, and, in the course of its opinion, quotes an accepted definition of the term "mining claim" as generally understood, it totally ignores the conditions existing in the state and of which it was bound to take judicial notice,[4] and the presumption that the legislature knew that a portion of the mining in the state was being carried on in lands the title to which was acquired in other ways than by location, and therefore enacted the legislation of the state with reference to all such conditions. Moreover, it ignored the broad and comprehensive definition of mining claim, which would make it extensive and include all kinds of mines, as the term was understood in other coun-

[1] Hicks v. Cons. Coal Co., 77 Md. 86, 25 Atl. Rep. 979; Grandby M. & S. Co. v. Turley, 61 Mo. 375; Meistrell v. Reach, 56 Mo. App. 243; Springfield Found. & Mach. Co. v. Cole, 130 Mo. 1, 31 S. W. Rep. 922; Warren v. Sohn, 112 Ind. 213, 13 N. E. Rep. 863: Shull v. Fontanet M. Ass'n, 128 Ind. 331, 26 N. E. Rep. 790; Reed's Appeal, 18 Pa. St. 235; Beatty's Appeal, 3 Grant, 213; Wood's Appeal, 30 Pa. St. 274; Taylor v. Smith, 1 Ches. Co. 106.

[2] Williams v. Santa Clara M. Co. of Baltimore, 66 Cal. 193, 5 Pac. Rep. 85; Morse v. De Adro, 107 Cal. 622, 40 Pac. Rep. 1018.

[3] See *post*, §§ 1692, 1701.

[4] See Irwin v. Phillips, 5 Cal. 140.

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tries, and in other states in this country, as possibly existing separate from the other estate. To say that the legislature intended the miner on a regularly established location to have his lien, but denied it to the miner mining upon an agricultural claim or a Mexican grant, is to impeach the common sense of the legislators.

Article B.

For What Services Allowed.

§ 1690. Who entitled in general — Superintendent — Teamster.
1691. Same — Carrying on works — Drifting in tunnel.
1692. General principles — Liberal construction — Remedy.
1693. Assignability.
1694. Same subject — Assignable — General provisions.

§ 1690. Who entitled in general — Superintendent — Teamster. — As before intimated, the lien law is a creature of statute. It is a statutory mortgage fixed upon the property, and is generally preferred over all other contemporaneous claims, and, as a general rule, relates to the commencement of the employment, so as to cut off all intervening mortgages or claims. In some states, too, laborers are preferred over all others, while the superintendent is not included.[1] But the older and prevailing doctrine, founded upon justice, principle and reason, is that the superintendent is entitled to his lien just as much as any other employee.[2] In Colorado, under a statute allowing a lien for work and labor on a mine, which the court construed to mean and include work done in the development, conservation or im-

[1] Smallhouse v. Kentucky M. Co., 2 Mont. 448, 9 M. R. 388.

[2] Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. Rep. 433; Capron v. Strout, 11 Nev. 304; Flagstaff M. Co. v. Cullins, 104 U. S. 176; s. c., 2 Utah, 210; Palmer v. Uncas Co., 70 Cal. 614, 11 Pac. Rep. 666; McLaren v. Byrnes, 45 N. W. Rep. 143; Skyrme v. Occidental M. Co., 8 Nev. 219; Boyle v. Mountain Key M. Co. (N. Mex.), 50 Pac. Rep. 347. See also Knight v. Norris, 13 Minn. 473.

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provement of the mine, it has been held that a teamster has no lien for hauling ore.[1] But this is certainly against the weight of reason and authority. There is no valid reason why the ore-hauler who contributes to the marketing of the product from the mine, or to hauling supplies thereto, cannot be equally protected. As said by Hillier, District Judge: "The mill upon which the lien is claimed is one for crushing the quartz and separating the precious metals therefrom, and the labor performed by petitioner (this was in bankruptcy proceedings) was hauling quartz for the bankrupt to be crushed at this mill. This, it is said, is not the performing of labor in carrying on the milling, but I think it must be so considered. These laws always receive a liberal construction in favor of laborers' liens. The labor of hauling the quartz to a mill of this character is indispensable to carrying it on, and the language of the statute will not have to be strained in the least to include within its terms the person performing such labor."[2] It has even been held that a co-tenant has a preferred claim for improvements against the mortgagee.[3]

§ 1691. Same — Carrying on works — Drifting in tunnel. — In Nevada, under a statute authorizing a lien upon mines and also for carrying on any work upon mills or reduction works, it was held that a teamster hauling ore to the mill was entitled to a lien;[4] but in California it was held as matter of law that "drifting in a tunnel" was not synonymous with "mining a tunnel," for which a lien was authorized by statute, nor was it labor in construction, altera-

[1] Barnard v. Kelly, 4 Colo. 251. See Wickham v. Hardy, 5 Jur. 871; Cumberland Ry. Co. v. Slack, 40 Md. 161.

[2] In re Hope M. Co., 1 Sawy. 710, 9 M. R. 364. See also Warner v. Hudson River R. Co., 5 How. Pr. 454; Atcherson v. Troy R. Co., 6 Abbott's Pr. (N. S.) 329; Hill v. Newman, 38 Pa. St. 151.

[3] Stenger v. Edwards, 70 Ill. 631, 9 M. R. 368; Mellor v. Vallentine, 3 Colo. 260.

[4] Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30. But see, to the contrary, Barnard v. Kelly, 4 Colo. 251.

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tion or repairs of any building, or improvement on or in any mine, and the claim of lien was denied.[1]

§ 1692. General principles — Liberal construction — Remedy.— The purpose of our excursion into the subject of liens at all forbids any extended examination into general principles. We have sought to confine our inquiry to special matters relating to mines and mining property and to persons performing labor or making improvements thereon. We have attempted to show that the lien law is remedial in its nature and character, and that a liberal rule of construction should be applied. With reference to the remedy, however, the rule becomes more stringent, and in enforcing the remedy the statute must be strictly pursued. Respecting the general rule that the statute, as regards the right itself, should be liberally construed, the supreme court of Nevada said: "We have repeatedly declared that the act relating to mechanics' liens should be liberally construed; that the spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions; and that courts should 'avoid unfriendly strictness and mere technicality.'"[2]

§ 1693. Assignability.— Much doubt originally existed as to whether a lien of any kind, being a personal right at the common law, could be assigned. But the later decisions settle the doubt in favor of the assignability of all liens, and in many of the states they are made assignable by statute.[3]

[1] Jurgensen v. Diller, 114 Cal. 492, 46 Pac. Rep. 610. See as to notice to owner of such work being performed, Avery v. Clark, 87 Cal. 619, 25 Pac. Rep. 919.

[2] Malter v. Falcon M. Co., 18 Nev. 209, 3 Pac. Rep. 50, citing Skyrme v. Occidental M. & M. Co., 8 Nev. 221; Hunter v. Truckee Lodge, 14 Nev. 28; Lonkey v. Wells, 16 Nev. 274. See also Ascha v. Fitch, 46 Pac. Rep. 298; Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458. See especially Watson v. Noonday M. Co., 57 Oreg. 287, 60 Pac. Rep. 994.

[3] Skyrme v. Occidental M. Co. See *post*, § 1694.

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§ 1694. Same subject — Assignable — General provisions.— Substantial compliance with the statute is generally requisite, and the lien attaches in favor of all persons who fairly come within the provisions of the statute, their claims, of course, being based upon contract.[1] A claim in excess of the real amount does not vitiate the lien for the amount actually due.[2] Being a mere personal right, the old authorities held that it was not assignable, but the later decisions have taken a more practical view of the subject, and we think the correct one; and it may now be considered as settled that, in the absence of statute to the contrary, even a claim for a miner's lien is assignable. The debt would be assignable in the absence of the lien, and no good reason can be found, and it is believed that none exists, why the statutory adjunct or mortgage should not also be assignable.[3] Where claims are worked in a group, the lien attaches to the entire group.[4]

Article C.

Against Whom, What Interest and What May Be Reached — Lessee's and Working Bond Interests.

§ 1700. Against whom — Leases and working bonds.
1701. To what may attach — Mineral land not so located.
1702. On mine worked by option holder.
1703. Iowa rule — Lessor held liable.
1704. Prospecting gives no right to lien.
1705. Agent — Who is.
1706. Notice and foreclosure.
1707. Knowledge of owner — Strict construction.
1708. Summary — The doctrine of this chapter restated.

[1] Malone v. Big Flat Gravel Co., 76 Cal. 583, 18 Pac. Rep. 772; Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751; Folsom v. Cragen, 11 Colo. 205, 17 Pac. Rep. 515; Skyrme v. Occidental Co., 8 Nev. 219; Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50.

[2] Nolan v. Lovelock, 1 Mont. 224, 9 M. R. 360; Allen v. Frumet M. Co., 73 Mo. 688; Davis v. Alvord, 94 U. S. 545.

[3] Skyrme v. Occidental M. Co., *supra;* Ford Gold M. Co. v. Langford, 1 Colo. 62; Tuttle v. Howe, 14 Minn. 150.

[4] Tredinnick v. Red Cloud Co., 13 Pac. Rep. 152; Bassick M. Co. v. Schoolfield, 10 Colo. 146, 14 Pac. Rep. 65.

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§ 1700. Against whom — Leases and working bonds.— It may be stated as a general rule that no lien will exist except by virtue of a contract with the owner. Whence it follows that in all cases of leases and working bonds, where the owner has no interest in the work itself, except the reception of certain proceeds in the way of rent or royalties, his interest will not be the subject of a lien for work done or liabilities incurred by the lessee.[1] And in such case the lien, if one lies at all,[2] will only reach the leasehold interest.[3] A correct illustration of this rule is found in Montana, where this subject has been regulated by statute which provides in effect that the interest of the proprietors in leased premises may not be charged with a lien for labor performed for the use and benefit of the tenants and lessees.[4] The supreme court, in construing a contract by the terms of which S. was to operate a mine for one year; to have exclusive charge of the work; furnish all labor and materials, and to receive as compensation eighty per cent. of the net returns of all ores marketed, which should be marketed in the name of the owner, held S. to be a lessee of the mine, and therefore that the interest of the owner was not chargeable with a lien for labor and materials furnished at the request of S.[5]

§ 1701. To what may attach — Mineral land not so located.— Ordinarily, in the absence of statute, a lien will not attach to a leasehold interest, and of course, as previously stated,[6] where it does attach it is only to the lessee's and not

[1] United Mining Co. v. Hatcher, 25 C. C. A. 46, 79 Fed. Rep. 516, modifying s. c., 75 Fed. Rep. 368; Jurgensen v. Diller, 114 Cal. 491, 46 Pac. Rep. 610; Davidson v. Jennings (Colo.), 60 Pac. Rep. 354; Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843; Little Valeria G. M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970; Pelton v. Minah Cons. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; Stinson v. Hardy, 27 Oreg. 584, 41 Pac. Rep. 116.

[2] *Post*, § 1701.

[3] *Post*, § 1702.

[4] Act March 9, 1887, Extra Sess. 1887, p. 71.

[5] Pelton v. Minah Cons. M. Co., *supra*.

[6] *Ante*, § 1700.

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the lessor's or proprietor's interest. This matter has been regulated by statute in nearly all the mining states, in some of which the miner is given a lien on the lessee's interest in the property, while in others it is restricted to freehold estates, or leasehold interests exceeding two years.[1] The supreme court of California, as we have already seen,[2] has adopted the very narrow construction as to the meaning of the words "mining claim" as used in the statute, and restricted the operation of the lien law to mining claims which were located as such.[3] In the last case the meaning of the court is somewhat obscured by unnecessary dictum, but, if we glean the correct conclusion, it was that where a mining claim was partly made of regular mining claims and partly of land patented as a Mexican grant, the lien would not extend to the portion not located as a mine, and substantially the same rule was announced in the other case; but, as above noted, we have fully discussed this matter elsewhere. The strength of our reasoning and the weakness of that of the court is illustrated by the rule laid down by the supreme court of Oregon, that where a statute gives a lien on a mining claim for work and materials, this has been held to apply to a mining claim where valuable minerals have not, as well as to land where they have, been discovered.[4]

The general rule which applies to the description of mining property in conveyances, viz., that it must be described with such particularity as that the exact land intended to be included can be readily ascertained, must be followed in the description of property sought to be charged with a miner's or mechanic's lien. Failure to do this makes the lien ineffectual. For instance, where a notice of lien incorrectly de-

[1] A synopsis of the statutes of the different states upon the subject of miners' liens is contained in Appendix B, *post*.

[2] *Ante*, § 1684.

[3] Williams v. Santa Clara M. Co., 66 Cal. 193, 5 Pac. Rep. 85, cited *ante*, § 1685; Bewick v. Muir, 83 Cal. 368, 23 Pac. Rep. 389.

[4] Williams v. Toledo Coal Co., 25 Oreg. 426, 36 Pac. Rep. 159.

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scribed the property by metes and bounds, attempting to further identify it by giving the name of its owner, who, it appeared, owned other mining property in the neighborhood, it was held void for uncertainty.[1]

§ 1702. On mine worked by option holder.—There has been some contrariety of opinion as to whether a mine worked by an option holder was liable to a lien for work performed by a miner who was employed by such option holder. It would seem, as a general rule, on principle, that practically the same rule would apply as to a lessee, and no lien could attach to any greater interest than the option holder had. Otherwise it would make the owner of the mine liable for work not done at his request — make him a debtor against his will; and it would be no answer to this to say that he received the benefit of it. He cannot be called upon to take the risk of losing his mine on account of non-payment of any such claims. This, of course, where nothing more than a bare, naked option exists. But in Arizona, under a lease and contract of purchase, it was held that for the purpose of the lien statute the lessee and contractor (Mott) was an agent of the owners (Bashford and others), and it was held under the peculiar circumstances of the case, including the reading of the instrument, which, among other things, provided for said Mott to have charge and control of the mill and mines, the miners and mill-men were entitled to a lien.[2]

It may be that this conclusion is barely justifiable under the peculiar provisions of the instrument under consideration, but if it is, it is certainly as far as the courts ought to go in that direction. We would not deprive a miner of a single remedy or right given him by virtue of the lien statute, but the true intent of the law can be best subserved by limiting the right to a contract with the owner or his agent.

[1] Fernandez v. Burleson, 110 Cal. 164, 42 Pac. Rep. 556. See also *post*, § 1706.

[2] Eaman v. Bashford (Ariz.), 87 Pac. Rep. 24.

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In Montana, where the owner of a mine granted possession thereof for a limited period, with the privilege to purchase the property and to mine ores therefrom, but provided certain conditions for the conducting of the work for which he should pay, and it was further provided that the owner was to receive a certain percentage of the ore extracted, which should apply on the purchase if the option were exercised, otherwise to be retained by the lessor, it was held that persons performing labor or furnishing materials for the lessee had no lien upon the mine.[1]

§ 1703. Iowa rule — Lessor held liable.— In Iowa, under a statute of that state which reads: "Every laborer or miner, who shall perform labor in opening, developing or operating any coal mine, shall have a lien on all the property of the person, firm or corporation owning or operating such mine, and used in the construction or operation thereof, including real estate and personal property, for the value of such labor, to the full amount thereof, to be secured and enforced as mechanics' liens are," the court held that such statute formed a part of every contract of lease, and that where the lien was claimed for labor or materials, done and furnished by plaintiff and his assignors, which permanently enhanced the value of the property (an air shaft, tracking and a siding), the lessor was liable for the actual value of such improvements, to the extent that the property had been enhanced in value thereby; expressly refraining from passing upon the rights of a miner whose claim would be for removing the coal and diminishing the value of the property.[2]

§ 1704. Prospecting gives no right to lien.— Where the work is that of prospecting, for the benefit of the prospector,

[1] Block v. Murray, 12 Mont. 545, 31 Pac. Rep. 550. See also Pelton v. Minah Cons. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; *ante*, § 1700.

[2] Mitchell v. Burwell, 110 Iowa, 10, 81 N. W. Rep. 193, citing Reynolds v. Black, 91 Iowa, 1, 58 N. W. Rep. 922; St. Paul T. I. & T. Co. v. Diagonal Coal Co., 95 Iowa, 551, 64 N. W. Rep. 606; Lambert v. Davis, 116 Cal. 292, 48 Pac. Rep. 128.

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to ascertain whether he desires a lease on the property, he is not entitled to any lien. Thus, drilling a hole in land for prospecting purposes only, for no other purpose than to ascertain the existence of minerals in sufficient quantity to justify working, and where the prospector was interested in the result, was held not to entitle him to a lien.[1] But, of course, the rule would be different if the prospecting was done under employment by the owner and for his benefit.

§ 1705. Agent — Who is.— Where the statute authorizes a lien for work done by authority of an agent, the agency must be established, and it is said to be not established by proof and finding "that at said time defendant P. was in possession of said premises described in the complaint under a contract theretofore entered into between said defendant P. and the other defendant mining company, under which contract said P. was authorized and empowered to occupy and hold possession of said premises and make extensive improvements and prosecute development work and prospecting thereon and therein."[2] This is clinging to the line of strict construction, to say the least; yet it is nevertheless true, of course, that the agent authorizing the work must be in fact the agent of the owner sought to be charged; and where the agency is denied, the failure to find upon it is error,[3] as the agency will not be presumed.[4] "A party desiring to hold and enforce a lien upon the property of one who did not employ him must bring his case clearly within the terms of the statute. The lien is a creation of the statute, and the statute creating it must be looked to, both for the right to such lien and the mode by which it may be enforced."[5]

[1] Colvin v. Weimer, 64 Minn. 37, 65 N. W. Rep. 1079.

[2] Reese v. Bald Mountain Cons. M. Co. (Cal.), 65 Pac. Rep. 578.

[3] Soto v. Irvine, 60 Cal. 436; Malone v. Bosch, 104 Cal. 681, 38 Pac. Rep. 516; Spect v. Spect, 88 Cal. 439, 26 Pac. Rep. 203, 13 L. R. A. 137, 22 Am. St. 313; Reese v. Mining Co., *supra*.

[4] Reese v. Mining Co., *supra*.

[5] Spinney v. Griffith, 98 Cal. 151, 32 Pac. Rep. 974; Reese v. Mining Co., *supra*. See also Ayers v. Green

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§ 1706. Notice and foreclosure.— The purposes of this work, and lack of space alike, forbid a general examination into the contents of the notice and the pleadings and proceedings on foreclosure. It is sufficient to say, in a general way, that the notice of lien must substantially conform to the statute,[1] and if essentially defective in substance it cannot be aided by complaint or evidence. While the law is, in one sense, remedial, and hence entitled to liberal construction, it must be remembered that all these proceedings are *in invitum*, dependent for their force and validity upon the statute and a substantial compliance therewith; whence the rule that if the statute is not complied with in all essential particulars no lien results. By this it is not meant that a slavish technical adherence is required, but simply a fair, substantial compliance. As was said by the supreme court of Nevada: "This rule should always be followed when the objections urged serve only to perplex and embarrass a remedy intended to be simple and summary, without adding anything to the security of the parties having an interest in the property sought to be affected. But in following this rule, courts should always be careful not to impair the force of the statute or fritter away its meaning by construction. It must always be borne in mind that a mechanic's lien is purely of statutory creation, and that it can only be maintained by a substantial observance of, and compliance with, the provisions of the statute. It is a 'remedy given by law,' which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements."[2]

Gold M. Co., 116 Cal. 335, 48 Pac. Rep. 221; Jurgensen v. Diller, 114 Cal. 492, 46 Pac. Rep. 611.

[1] Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50: Mays v. Ruffners, 8 W. Va. 386; Bertheolet v. Parker, 43 Wis. 551; Rugg v. Hoover, 26 Minn. 407, 10 N. W. Rep. 473.

[2] Malter v. Falcon M. Co., *supra;* Phil. Mech. Liens, sec. 89: Skyrme v. Occidental M. Co., 8 Nev. 221;

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§ 1707. Knowledge of owner — Strict construction.— In California, it seems there is, to say the least, an unfortunate disposition to sacrifice the rights sought to be conferred by the statute upon the altar of strict construction. First it is said that drifting in a tunnel is not running a tunnel, all of which is a question of fact.[1] Then it is said that while the statute requires the owner with knowledge of work being done upon his land to give notice of nonresponsibility within three days,[2] still he is not liable for not so doing because labor in a mine is not an improvement upon land within the meaning of the statute.[3] All of which merely serves to show that it is one thing to enact a statute and another thing to have it enforced.

§ 1708. Summary — The doctrine of this chapter restated.—The most that can be said in conclusion is that the law of miners' and mechanics' liens is still in its formative state, and courts are yet widely divided both in respect of the subject-matter comprehended by the statute, and what is a sufficient compliance therewith in its enforcement.

We think we are justified in saying, however, that better and the great weight of authority require that the statute should be substantially followed in all its particulars, which is far from saying that a slavish adherence thereto is required.

That all labor bestowed upon a mine, whether manual or supervisory, resulting in its substantial development for the owner or under his direction personally or through his agent, is the proper subject of a lien. The statute of the particular jurisdiction, however, when properly and fairly construed, must be the ultimate guide in all these proceedings.

Hunter v. Truckee Lodge, 14 Nev. 28; Lonkey v. Wells, 16 id. 274. See also *ante*, § 1700.

[1] Jurgensen v. Diller, 114 Cal. 492, 46 Pac. Rep. 611.

[2] California Code C. P., § 1192; Jurgensen v. Diller, *supra;* Reese v. Bald Mountain Cons. Mining Co. (Cal.), 65 Pac. Rep. 578.

[3] Reese v. Mining Co., *supra.*

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APPENDIX.

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PART XVI.

APPENDIX A.

FEDERAL STATUTES.

I. The Law of 1866.
II. Placer Law of July 9, 1870.
III. The Law of 1872, and Prior and Subsequent Enactments as Embraced in Title XXXII, Chapter 6, Revised Statutes.
IV. Acts of Congress Passed Subsequent to the Revised Statutes, in Addition to the Amendments Thereto.
  a. An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.
  b. An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.
  c. An act extending the mining laws to saline lands.
  d. An act to repeal the timber-culture laws, and for other purposes.
  e. An act making appropriations . . . and for other purposes. (Restricting amount of land which may be entered.)
  f. An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes.
  g. An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.
  h. An act to exclude the states of Missouri and Kansas from the provisions of the act of congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.
  i. An act to open forest reservations in the state of Colorado for the location of mining claims.
  j. Extract from appropriation act of June 4, 1897, providing for the restoration to the public domain of mineral lands in forest reservations.
V. Provisions of the Revised Statutes of the United States Relative to Coal Lands.

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VI. GENERAL PROVISIONS OF THE UNITED STATES LAW RELATING TO THE DISTRICT OF ALASKA.
a. General provisions.
b. An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes. (Relating to citizens of Canada.)
c. Portion of an act making further provisions for Alaska, and for other purposes.
d. Land department regulations governing Alaska.
VII. AN ACT TO CREATE THE CALIFORNIA DEBRIS COMMISSION AND REGULATE HYDRAULIC MINING IN THE STATE OF CALIFORNIA.

I. THE LAW OF 1866.

AN ACT granting the right of way to ditch and canal owners over the public lands, and for other purposes.

(14 Stats. at Large, ch. 262, p. 251.)

Be it enacted, etc.:

§ 1. [**Who may locate — What laws govern.**] —That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. (Repealed May 10, 1872, § 1; R. S., § 2320.)

§ 2. [**Entry and patent — Extra-lateral rights.**] — *And be it further enacted*, that whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be

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lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition. (Repealed May 10, 1872, §§ 6, 9; R. S., §§ 2325, 2328.)

§ 3. [**Patent proceedings.**] — *And be it further enacted*, that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey and description; and a patent shall issue for the same thereupon. But said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued. (Repealed May 10, 1872, §§ 6, 7, 9; R. S., §§ 2325, 2326, 2328.)

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§ 4. [**Surveys — Length of claim — Number of claims to each locator — Extra-lateral right — Surface to accompany lode.**] — *And be it further enacted*, that when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys to adjust the surveys to the limits of the premises according to the location and possession of plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners; *provided*, that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for the discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules; *and provided further*, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons. (Repealed May 10, 1872.)

§ 5. [**States may supply legislation regulating the working of mines.**] — *And be it further enacted*, that as a further condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. (Repealed May 10, 1872, § 5; R. S., § 2324.)

§ 6. [**Adverse claim — Stay of proceedings.**] — *And be it further enacted*, that whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when

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a patent may issue as in other cases. (Repealed May 10, 1872, § 7; R. S., § 2326.)

§ 7. (Preserved in R. S., § 2343, which see.)

§ 8. (Preserved in R. S., § 2477, which see.)

§ 9. (Preserved in R. S., § 2339, which see.)

§ 10. (Substantially preserved in R. S., § 2341, which see.)

§ 11. (Preserved in R. S., § 2342, which see.)

II. Placer Law of July 9, 1870.

AN ACT to amend "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes." (16 Stats. at Large, ch. 235, p. 217.)

Act of 1866 amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the act granting the right of way to ditch and canal owners, and for other purposes, approved July twenty-sixth, be, and the same is hereby amended, by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

§ 12. [**Placers subject to entry — Size of claim — Group claims.**] — *And be it further enacted*, that claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; *provided*, that where the lands have been previously surveyed by the United States, the entry, in its exterior limits, shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre; *provided further*, that legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry

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thereof; *and, provided further*, that no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser. (Embraced substantially in § 2329, which see; *post*, III, this Appendix.)

§ **13.** (Is substantially the same as § 2332, R. S.)

§ **14.** (Preserved in R. S., § 2335.)

§ **15.** [**Fees.**] — *And be it further enacted*, that registers and receivers shall receive the same fees for services under this act as are provided by law for like services under the acts of congress; and that effect shall be given to the foregoing act according to such regulations as may be prescribed by the commissioner of the general land office. (See R. S., § 2338.)

§ **16.** [**Public surveys extended.**] — *And be it further enacted*, that so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands of California, the granting of pre-emption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands; *provided*, that all subdividing of the surveyed lands into lots of less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants, *and provided further*, that nothing herein contained shall require the survey of waste or useless land.

§ **17.** [**Easements for water rights.**] — *And be it further enacted*, that none of the rights conferred by section five, eight, and nine of the act of which this is amendatory shall be abrogated by this act; and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed,

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shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six. (Embraced substantially in §§ 2340, 2344, R. S., which see; *post*, III, this Appendix.)

III. The Law of 1872, and Prior and Subsequent Enactments as Embraced in Title XXXII, Chapter 6, Revised Statutes.

Sec. 2318. [Mineral lands reserved.] — In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (Act July 4, 1866, ch. 166, § 5, 14 Stat. at L., p. 86.)

Sec. 2319. [Mineral lands open to purchase by citizens.] All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (Act May 10, 1872, ch. 152, § 1, 17 Stat. at L., p. 91.)

Sec. 2320. [Length of mining claims upon veins or lodes.] — Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the cus-

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toms, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. (Act May 10, 1872, ch. 152, § 2, 17 Stat. at L., p. 91.)

Sec. 2321. [Proof of citizenship.] — Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. (Act May 10, 1872, ch. 152, § 7, 17 Stat. at L., p. 94.)

Sec. 2322. [Locators' rights of possession and enjoyment — Extra-lateral rights.] — The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included

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within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (Act May 10, 1872, ch. 152, § 3, 17 Stat. at L., p. 91.)

Sec. 2323. [Owners of tunnels, rights of.] — Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. (Act May 10, 1872, ch. 152, § 4, 17 Stat. at L., p. 19.)

Sec. 2324. [Requisites of a valid location, annual labor, forfeiture of co-owners' interests — Regulations by miners.] — The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which

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the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required

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by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. (Act May 10, 1872, ch. 152, § 5, 17 Stat. at L., p. 92.)

[**Amendment extending time for first expenditure on certain claims.**] — That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five. (Act of Cong. approved June 6, 1874, 18 Stat. at L., p. 61.)

[**Amendment permitting work done in a tunnel to be considered as if expended on lode.**] — That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (Act of Cong. approved Feb. 11, 1875, 18 Stat. at L., p. 315.)

Sec. 2. [**Amendment providing that on unpatented claims period commences on January 1 succeeding date of location.**] — That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims lo-

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cated since the tenth day of May, anno Domini eighteen hundred and seventy-two." (Act of Cong. approved Jan. 22, 1880, 21 Stat. at L., p. 61.)

Sec. 2325. [Patents for mineral lands, how obtained.] — A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate descrip-

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tion, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. (Act May 10, 1872, ch. 152, § 6, 17 Stat. at L., p. 92.)

[**Amendment permitting application and affidavits to be made and filed by agent.**] — That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, that this section shall apply to all applications now pending for patents to mineral lands." (Act of Cong. approved March 3, 1881, 21 Stat. at L., p. 505.)

Sec. 2326. [**Adverse claim — Requisites of — Proceedings on.**] — Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of

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competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever. (Act May 10, 1872, ch. 152, § 7, 17 Stat. at L., p. 93.)

[**Amendment providing for judgment when neither party entitled.**] — That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not

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be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. (Act of Cong. approved March 3, 1881, 21 Stat. at L., p. 505.)

[**Amendment permitting adverse claim to be verified by agent.**] — That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the state or territory where the adverse claimant may then be, or before any notary public of such state or territory.

Sec. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any state or territory. (Act of Cong. approved April 26, 1882, 22 Stat. at L., p. 49.)

Sec. 2327. [**Description of vein claims on surveyed and unsurveyed lands.**] — The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim. (Act May 10, 1872, ch. 152, § 8, 17 Stat. at L., p. 94.)

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Sec. 2328. [Pending applications — Existing rights.]— Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. (Act May 10, 1872, § 9, 17 Stat. at L., p. 94.)

Sec. 2329. [Placers subject to entry same as lodes — Conform to legal subdivisions of public survey.] — Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein ore lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. (Act July 9, 1870, ch. 235, § 12, 16 Stat. at L., p. 317.)

Sec. 2330. [Size of placer claims.] — Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser. (Act July 9, 1870, ch. 235, § 12, 16 Stat. at L., p. 217.)

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Sec. 2331. [No survey necessary where placers on surveyed lands — Limitation of claims.] — Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. (Act May 10, 1872, ch. 152, § 10, 17 Stat. at L., p. 94.)

Sec. 2332. [Entry under statute of limitations.] — Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. (Act July 9, 1870, ch. 235, § 13, 16 Stat. at L., p. 217.)

Sec. 2333. [Patent for placer containing a lode.] — Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of

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this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode-claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode-claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode-claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof. (Act May 10, 1872, ch. 152, § 11, 17 Stat. at L., p. 94.)

Sec. 2334. [Surveyor-general may appoint deputy mineral surveyors — Expense of surveys, etc., borne by applicant — Regulation of.] — The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode-claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining notices in such district,

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and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office. (Act May 10, 1872, ch. 152, § 12, 17 Stat. at L., p. 95.)

Sec. 2335. [Affidavits, before whom taken — Testimony in case of contest.]— All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given. (Act May 10, 1872, ch. 152, § 13, 17 Stat. at L., p. 95.)

Sec. 2336. [Cross-veins.] — Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. (Act May 10, 1872, ch. 152, § 14, 17 Stat. at L., p. 96.)

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Sec. 2337. [Non-mineral land for mill-site.] — Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section. (Act May 10, 1872, ch. 152, § 15, 17 Stat. at L., p. 96.)

Sec. 2338. [Conditions by local legislature expressed in patent.] — As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. (Act July 26, 1866, ch. 262, § 5, 14 Stat. at L., p. 252.)

Sec. 2339. [Vested rights to use of water for mining, etc.— Right of way for canals.] — Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (Act July 26, 1866, ch. 262, § 9, 14 Stat. at L., p. 253.)

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Sec. 2340. [Patents, pre-emptions and homesteads subject to vested and accrued water-rights.] — All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section. (Act July 9, 1870, ch. 235, § 17, 16 Stat. at L., p. 218.)

Sec. 2341. [Mineral lands in which no valuable mines are discovered open to homesteads.] — Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title relating to "Homesteads." (Act July 26, 1866, ch. 262, § 10, 14 Stat. at L., p. 253.)

Sec. 2342. [Mineral lands, how set apart as agricultural lands.] — Upon the survey of the lands described in the preceding section, the secretary of the interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. (Act July 26, 1866, ch. 262, § 11, 14 Stat. at L., p. 253.)

Sec. 2343. [Additional land-districts and officers, power of the president to provide.] — The president is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may

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deem the same necessary for the public convenience in executing the provisions of this chapter. (Act July 26, 1866, ch. 262, § 7, 14 Stat. at L., p. 252.)

Sec. 2344. [Provisions of this chapter not to affect certain rights.] — Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-five, eighteen hundred and sixty-six. (Act May 10, 1872, ch. 152, § 16, 17 Stat. at. L., p. 96; also Id., 218.)

Sec. 2345. [Mineral lands in certain states excepted.] The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the states of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the states named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. (Act Feb. 18, 1873, ch. 159, 17 Stat. at L., p. 465.)

Sec. 2346. [Grant of lands to states or corporations not to include mineral lands.] — No act passed at the first session of the thirty-eighth congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. (Act Jan. 30, 1865, Res. No. 10, 13 Stat. at L., p. 567.)

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IV. Acts of Congress Passed Subsequent to the Revised Statutes, in Addition to the Amendments Thereto.

a. An Act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

[Entry of lands chiefly valuable for building stone under the placer-mining laws.] — That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided*, that lands reserved for the benefit of the public schools or donated to any state shall not be subject to entry under this act. (Act of Cong. approved Aug. 4, 1892, 27 Stat. at L., p. 348.)

b. An Act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws of the United States.

[Entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws.] — That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. (Act of Cong. approved Feb. 11, 1897, 29 Stat. at L., p. 526.)

c. An Act extending the mining laws to saline lands.

That all unoccupied lands of the United States containing salt springs, or containing salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: *Provided*, that the same person shall not locate or enter more than one claim hereunder. (Act Jan. 31, 1901, 31 Stat. at L., p. 145.)

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d. AN ACT to repeal the timber-culture laws, and for other purposes. (Town sites on mineral lands.)

Sec. 16. [Town sites on mineral lands authorized — Lands entered under the mineral laws not included in restriction to three hundred and twenty acres.] — That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant. (Act of Cong. approved March 3, 1891, 26 Stat. at L., p. 1095; 1 Sup. R. S. U. S., p. 945.)

e. AN ACT making appropriations . . . and for other purposes. (Restricting amount of land which may be entered.)

[Right of entry under all land laws limited to three hundred and twenty acres.] — No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, that in all patents for lands hereafter taken up under any of the land

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laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. . . . (Act of Cong. approved Aug. 30, 1890, 26 Stat. at L., p. 371.)

The compiler of the land-office circular of June 24, 1899 (28 L. D. 591), seems to think that this provision is repealed by section 17 of the act approved March 3, 1891 (26 Stat. at L. 1095), but a careful examination of that section fails to satisfy us that it repeals this one. It simply provides that the act shall only include agricultural, and not mineral lands. Following is the section in full:

Sec. 17. [Reservoir sites under act of August 30, 1890 — Only agricultural lands included.] — That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provisions of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands en-

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tered or sought to be entered under mineral land laws. (Act of Cong. approved March 3, 1891, 26 Stat. at L., p. 1095; 1 Sup. R. S. U. S., p. 945.)

f. AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

[**Citizens may fell timber for mining purposes.**]—That all citizens of the United States and other persons, *bona fide* residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, the provisions of this act shall not extend to railroad corporations.

Sec. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the commissioner of the general land office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

Sec. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance

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thereof made by the secretary of the interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. (Act of Cong. approved June 3, 1878, 20 Stat. at L., p. 88.)

g. AN ACT to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

[**Alabama excepted from the operation of the mineral laws.**] — That within the state of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however*, that all lands which have heretofore been reported to the general land office as containing coal and iron shall first be offered at public sale: *And provided further*, that any *bona fide* entry under the provisions of the homestead law of lands within said state heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto. (Act Cong. approved March 3, 1883, 22 Stat. at. L., p. 487.)

h. AN ACT to exclude the states of Missouri and Kansas from the provisions of the act of congress entitled "An act to promote the development of the mining resources of the United States," approved May 10, 1872.

[**Missouri and Kansas excluded from the operation of the mineral laws.**] — That within the states of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said states shall

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be subject to disposal as agricultural lands. (Act of Congress approved May 5, 1876, 19 Stat. at L., p. 52.)

i. AN ACT to open forest reservations in the state of Colorado for the location of mining claims.

[**Forest reservations opened for mining claims.**] — *Be it enacted, etc.*, that the forest reservations in the state of Colorado, known as the Pike's Peak Forest Reserve, the Plum Creek Forest Reserve, and the South Platte Forest Reserve, established by executive proclamations dated, respectively, March eighteenth, eighteen hundred and ninety-two, June twenty-third, eighteen hundred and ninety-two, and December ninth, eighteen hundred and ninety-two, in the state of Colorado in accordance with section twenty-four of the act of March third, eighteen hundred and ninety-one, from and after the passage of this act, shall be open to the location of mining claims thereon for gold, silver, and cinnabar, and that title to such mining claims may be acquired in the same manner as it may be acquired to mining claims upon the other mineral lands of the United States for such purposes: *Provided*, that all locations of mining claims heretofore made in good faith within said reservations, and which have been held and worked in the same manner as mining claims are held and worked under existing law upon the public domain, are validated by this act.

Sec. 2. [**Timber may be removed for mining purposes only.**] — That owners of valid mining locations made and held in good faith under the terms of this act, shall be, and are hereby, authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim upon which the timber is felled or removed, but no other timber shall be felled or removed from any other portions of said reservations by private parties for any purpose whatever. (Act of Feb. 20, 1896, 29 Stat. at L., p. 11; Sup. R. S. U. S., vol. 2, p. 447.)

The subject of timber and forest reservations generally, is discussed at length in the text. Part IV, ch. IV.

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j. Extract from appropriation act of June 4, 1897, providing for the restoration to the public domain of mineral lands in forest reservations.

[Restoration of mineral lands to public domain — Subject to entry.] — . . . Upon the recommendation of the secretary of the interior, with the approval of the president, after sixty days' notice thereof, published in two papers of general circulation in the state or territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the secretary of the interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain.

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. . . . (Act June 4, 1897, par. 7, 30 Stat. at L., p. 11; Supp. R. S. U. S., vol. 2, pp. 621, 626.)

The subject of timber and forest reservations generally, is discussed at length in the text. Part IV, ch. IV.

V. Provisions of the Revised Statutes of the United States Relative to Coal Lands.

Sec. 2347. [Who may enter coal lands — Quantity.] — Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent

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authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. (Act March 3, 1873, ch. 279, § 1, 17 Stat. at L., p. 607.)

Sec. 2348. [Preference right — Four or more persons may take section, when.] — Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. (Ibid., § 2.)

A criticism of the construction of the above proviso by the land department is found in the text, § 704.

Sec. 2349. [Must file declaratory statement within sixty days.] — All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a de-

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claratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. (Ibid., § 3.)

Sec. 2350. [Right may be exercised but once — Applicant must enter and pay for lands within one year from declaratory statement.] — The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. (Ibid., § 4.)

Sec. 2351. [Priority of possession and improvements and compliance with law determine conflicting rights.] In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. (Ibid., § 5.)

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Sec. 2352. [To what provisions of this act applicable—Lands containing gold, silver or copper not to be taken.] Nothing in the five preceding sections shall be construed to destroy or impair any rights which have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for gold, silver or copper. (Act March 3, 1873, ch. 279, § 6.)

VI. General Provisions of the United States Law Relative to the District of Alaska.

NOTE.—The following extracts from the United States law are the only mining law the territory has, except district or miners' rules, which are expressly authorized and recognized by congressional laws.

The land department has formulated certain regulations especially applicable to Alaska, which it has been thought best to copy at length.

a. General provisions.

§ 7. **[Laws of Oregon declared in force.]**—That the general laws of the state of Oregon, now in force are hereby declared to be the law in said district, (Alaska) so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States; . . .

The effect of the above is destroyed by the provisions of the act of June 6, 1900, *post*, this sub-head, c.

§ 8. **[Land district, with office at Sitka.]**—That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. . . . (23 Stat. at L., p. 24, Act of May 17, 1884.)

[*Mining laws to apply.*]—And the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the secretary of the interior, approved by the president:

[*Persons in possession of lands not to be disturbed, etc.*]—*Provided*, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually

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in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by congress.

[*Mining locators may perfect claims.*]—*And provided further*, that parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid. . . . (Extract from Act of May 17, 1884, 23 Stat. at L., p. 24; 1 Sup. R. S. U. S. 430, 432–3.)

b. AN ACT extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.

Sec. 13. [Mining rights in Alaska to native-born citizens of the Dominion of Canada.]—That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said district of Alaska, and the secretary of the interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. (Act of Cong. approved May 14, 1898, 30 Stat. at L., p. 36.)

Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no

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provisions for such leases. (Land Office Circular, June 24, 1899, p. 36, par. 114.)

c. Portion of an act making further provisions for a civil government for Alaska, and for other purposes.

Sec. 15. [Duty of recorder to record location notices, etc.— Fees.] — The respective recorders shall, upon the payment of the fees for the same prescribed by the attorney-general, record separately, in large and well-bound separate books, in fair hand: . . .

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

Sec. 16. [Recorder to account to successor for unearned fees — Miners' regulations to be recorded, when.] Any clerk or commissioner authorized to record any instrument who having collected fees for so doing fails to record such instrument shall account to his successor in office, or to such person as the court may direct, for all the fees received by him for recording any instrument on file and unrecorded at the expiration of his official term, or at the time he is required to transfer his records to another officer under the direction of the court. And any clerk or commissioner who fails, neglects, or refuses to so account for fees received and not actually earned by the recording of instrument shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dol-

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lars nor more than one thousand dollars, and imprisoned for not more than one year, or until the fees received and unearned as aforesaid shall have been properly accounted for and paid over by him, as hereinbefore provided. And in addition such fees may be recovered from such clerk or commissioner or the bondsmen of either, in a civil action which shall be brought by the district attorney, in the name of the United States, to recover the same; and the amount when recovered shall be by the court transferred to the successor in office of such recorder, who shall thereupon proceed to record the unrecorded instruments: *Provided*, miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, all records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

Sec. 26. [Laws of the United States extended — Miners may make certain regulations — No exclusive permits.] — The laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are hereby extended to the district of Alaska: *Provided*, that subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all

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land and shoal water between low and mean high tide on the shores, bays and inlets of Bering sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, that the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the secretary of war authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the secretary of war may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

Sec. 27. [Indians and persons conducting missions or schools not to be disturbed — General land laws do not apply.] — The Indians or persons conducting schools or

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missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the secretary of the interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this act shall be construed to put in force in the district the general land laws of the United States. (Act of Congress approved June 6, 1900, 31 Stat. at L., pp. 321, 326, 330.)

d. Land department regulations governing Alaska.

1. In pursuance of the eighth section of the act of congress approved May 17, 1884, entitled "An act to provide a civil government for Alaska" (23 Stats. 24), it is hereby prescribed that the rules and regulations of the general land office and department of the interior governing the administration of the mining laws of the United States, be adopted for and extended to the district of Alaska, so far as the same may be applicable.

2. Notices required by mining laws and regulations to be published in a newspaper nearest the claim, may, until newspapers are established in Alaska, be published in some suitable newspaper or newspapers printed in Washington territory, to be designated by the *ex-officio* register of the land district of Alaska.

3. No public lands other than specific mineral claims are subject to survey or disposal in said district.

4. The *ex-officio* register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

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5. The commissioner of the general land office will from time to time direct the *ex-officio* land officers in the proper discharge of their official duties, and will exercise the same general supervision over the execution of the laws as are, or may be, exercised by him in other mineral districts. (4 L. D. 128, issued July 28, 1885.)

VII. An Act to Create the California Debris Commission and Regulate Hydraulic Mining in the State of California.

(Ch. 183, 27 Stat. at L., p. 507; 2 Sup. R. S. U. S., pp. 95, 100.)

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that a commission is hereby created, to be known as the California Debris Commission, consisting of three members. The president of the United States shall, by and with the advice and consent of the senate, appoint the commission from officers of the corps of engineers, United States army. Vacancies occurring therein shall be filled in like manner. It shall have the authority, and exercise the powers hereinafter set forth, under the supervision of the chief of engineers and direction of the secretary of war.

[**Organization of commission — Compensation — Adoption of rules.**] — § 2. That said commission shall organize within thirty days after its appointment by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said corps of engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of this act.

[**Territorial jurisdiction of commission — Hydraulic mining prohibited.**] — § 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the

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territory drained by the Sacramento and San Joaquin river systems of the state of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than is permitted under the provisions of this act is hereby prohibited and declared unlawful.

[**Duty of commission to adopt plans to restore navigability of rivers and permit hydraulic mining under proper restrictions.**] — § 4. That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, *provided* the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto.

[**Duty of commission to investigate practicability of storage sites and of settling reservoirs.**] — § 5. That it shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers, and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural

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erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.

[**Duty to note the effect on streams of such mining as the commission may permit.**]—§ 6. That the said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise.

[**Annual report of commission.**]—§ 7. That said commission shall submit to the chief of engineers, for the information of the secretary of war, on or before the fifteenth day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in this act, together with the estimates of the cost thereof, stating what amounts can be profitably expended thereon each year. The secretary of war shall thereupon submit same to congress on or before the meeting thereof.

[**"Hydraulic mining" defined.**]—§ 8. That for the purposes of this act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said state.

[**Permit to mine—How obtained—Petition.**]—§ 9. That the individual proprietor or proprietors, or in case of a corporation, its manager or agent appointed for that pur-

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pose, owning mining ground in the territory in the state of California, mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission.

[**Right to regulate the restraining of the debris to be surrendered by petitioner.**] — § 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said state, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state: *Provided*, that they shall not interfere with the navigability of the aforesaid rivers.

[**Joint petition by adjoining owners.**] — § 11. That the owners of several mining claims situated so as to require a common dumping ground or dam or other restraining works for the debris issuing therefrom in one or more sites may file a joint petition setting forth such facts in addition to the requirements of section nine hereof; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping sites for impounding debris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for herein.

[**Notice of petition to be published — Examination of mine — Plans may be filed — Further hearings.**] — § 12. A notice specifying briefly the contents of said petition and

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fixing a time previous to which all proofs are to be submitted shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper in at least three issues of the same. Pending publication thereof said commission, or a committee thereof, shall examine the mine and premises described in such petition. On or before the time so fixed all parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans and maps in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary.

[**Decision of commission — Order of directing manner of construction of dam and condition under which operations may be carried on.**]—§ 13. That in case a majority of the members of said commission, within thirty days after the time so fixed, concur in a decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if facilities therefor can be found, shall be built, and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interests and prevent injury to the said navigable rivers, and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this act in relation to the working thereof and the payment of the taxes on the gross proceeds of same: *Provided*, that all expenses incurred in complying with said order shall be borne by the owner or owners of such mine or mines.

[**Submission of plans for correction — Construction of works.**]—§ 14. That such petitioner or petitioners must within a reasonable time present plans and specifications of

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all works required to be built in pursuance of said order for examination, correction, and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said corps of engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act.

[**When mine owner may commence mining.**] — § 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: *Provided, however*, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations.

[**Joint construction and use by adjoining owners — Expense, how divided — Where dams must be constructed.**] — § 16. That in case the joint petition referred to in section eleven hereof is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry of such order, or in case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission,

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the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dam or works shall be divided among mine-owners using the same in such proportion as the commission shall determine. In all cases where it is practicable, restraining and impounding works are to be provided, constructed, and maintained by mine-owners near or below the mine or mines before reaching the main tributaries of said navigable waters.

[**No mining to be allowed where debris cannot be impounded.**] — § 17. That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected.

[**Commission may revoke or modify the order allowing owner to operate.**] — § 18. That the said commission may at any time, when the condition of the navigable rivers or when the capacities of all impounding and settling facilities erected by mine-owners or such as may be provided by government authority require same, modify the order granting the privilege to mine by the hydraulic mining process so as to reduce amount thereof to meet the capacities of the facilities then in use, or if actually required in order to protect the navigable rivers from damage, may revoke same until further notice of the commission.

[**Intentional violation of order works a forfeiture of right to mine.**] — § 19. That an intentional violation on the part of a mine owner or owners, company, or corporation, or the agents or employees of either, of the conditions of the order granted pursuant to section thirteen, or such modifications thereof as may have been made by said commission, shall work a forfeiture of the privileges thereby conferred,

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and upon notice being served by the order of said commission upon such owner or owners, company, or corporation, or agent in charge, work shall immediately cease. Said commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company, or corporation, or agents thereof, to comply therewith, or in the event of any person or persons, company, or corporation working by said process in said territory contrary to law.

[**Duty of commission to visit mines in operation.**] — § 20. That said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of this act. A report of such examination shall be placed on file.

[**Public lands and timber and stone thereon may be used by the commission.**] — § 21. That the said commission is hereby granted the right to use any of the public lands of the United States, or any rock, stone, timber, trees, brush, or material thereon or therein, for any of the purposes of this act; and the secretary of the interior is hereby authorized and requested, after notice has been filed with the commissioner of the general land office by said commission, setting forth what public lands are required by it under the authority of this section, that such land or lands shall be withdrawn from sale and entry under the laws of the United States.

[**Penalty for wilfully injuring dams, and for working by hydraulic process contrary to law.**] — § 22. That any person or persons who wilfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, any dam or other work erected under the provisions of this act for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed five thousand dollars or to be imprisoned not to exceed five years, or by both such fine and imprisonment, in

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the discretion of the court. And any person or persons, company or corporation, their agents or employees, who shall mine by the hydraulic process directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, that this section shall take effect on the first day of May, eighteen hundred and ninety-three.

[**Tax of three per cent. on gross proceeds of mine to be paid into treasury of United States — Debris fund.**] — § 23. That upon the construction by the said commission of dams or other works for the detention of debris from hydraulic mines and the issuing of the order provided for by this act to any individual, company, or corporation to work any mine or mines by hydraulic process, the individual, company or corporation operating thereunder working any mine or mines by hydraulic process the debris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay a tax of three per centum on the gross proceeds of his, their, or its mine so worked; which tax of three per centum shall be ascertained and paid in accordance with regulations to be adopted by the secretary of the treasury, and the treasurer of the United States is hereby authorized to receive the same. All sums of money paid into the treasury under this section shall be set apart and credited to a fund to be known as the "Debris Fund," and shall be expended by said commission under the supervision of the chief of engineers and direction of the secretary of war, in addition to the appropriations made by law in the construction and maintenance of such restraining works and settling reservoirs as may be proper and necessary: *Provided*, that said commission is hereby authorized to receive and pay into the treasury from the owner or owners of mines worked by the hydraulic pro-

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cess, to whom permission may have been granted so to work under the provisions hereof, such money advances as may be offered to aid in the construction of such impounding dams or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall be refunded as the said tax is paid into the said debris fund: *And provided further*, that in no event shall the government of the United States be held liable to refund same except as directed by this section.

[Commission may consult with a commission of engineers authorized by the state to act.] — § 24. That for the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the state of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to prevent the depositing of mining debris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said state, if authorized by said state for said purpose, the result of such conference to be reported to the chief of engineers of the United States army, and if by him approved shall be followed by said commission.

[Commission may construct dams to restrain debris already lodged in tributaries of main rivers — Certain recommendations adopted and made basis of operations — Appropriation.] — § 25. That said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin river systems resulting from mining operations, natural erosions, or other causes, shall be prevented from injuring the said navigable rivers, or such of the tributaries of either as may be navigable and the land adjacent thereto, is hereby directed and

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empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said debris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or branches of such tributaries, or at any place adjacent to the same, which in the judgment of said commission, will effect said object (the same to be of such material as will insure safety and permanency), such restraining or impounding dams and settling reservoirs, with canals, locks, or other works adapted and required to complete same. The recommendations contained in executive document numbered two hundred and sixty-seven, fifty-first congress, second session, and executive document numbered ninety-eight, forty-seventh congress, first session, as far as they refer to impounding dams, or other restraining works, are hereby adopted, and the same are hereby directed to be made the basis of operations. The sum of fifteen thousand dollars is hereby appropriated, from moneys in the treasury not otherwise appropriated, to be immediately available to defray the expenses of said commission. (Act March 1, 1898, 27 Stat. at L., p. 507; vol. 2, Sup. R. S. U. S., pp. 95–100.)

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APPENDIX B.

STATE STATUTES, ANNOTATED, SUPPLEMENTAL TO THE FEDERAL STATUTE, REGULATING THE LOCATION OF MINING CLAIMS UPON THE PUBLIC DOMAIN: THE MINING LAWS OF NEW YORK AND TEXAS; ALSO THE STATUTES OF MISSOURI, AND OTHER STATES, RELATING TO THE LEASING OF PUBLIC AND PRIVATE MINERAL LANDS.

PREFATORY NOTE.

The chief value of an appendix of state statutes for any purpose, as we view it, lies in its completeness. We have accordingly incorporated herein the mining law of Texas, New York and Michigan, and the law of Missouri and Wisconsin prescribing certain rules governing mining leases of private lands, in addition to the mining statutes of the western states and territories, supplemental to the federal statute.

As a matter of convenience to the reader, as well as for the purpose of economizing space wherever practicable, we have taken a section from one of the state statutes, as a text, and under it, as a note, we have compared all similar statutes on the subject, thus furnishing the statutory provisions of all the states and territories on the same subject under the same heading. The text on the subject of lodes, placers and mill sites is taken from Colorado; the tunnel and salt statute, from Nevada; drainage, and the manner of publishing out co-owners, from Arizona; leasing of private lands, from Missouri; leasing of public lands, from Utah; mining partnerships, from California; and grubstaking contracts, from Idaho.

Nearly all the western states have statutes relating to the location, recording and manner of holding lodes, placers and mill sites. The oldest of these, in point of enactment, is that of Colorado, from which the idea, but not the lan-

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guage in all cases, has been taken by nearly all the others. Permitting some one else to do the thinking, then using one's own language to express that thought and claiming it as his own, is less objectionable where the purloiner uses better language than his more energetic contemporary. These statutes, however, do not possess this merit, each attempt at improvement resulting in a product more ungrammatical than its predecessors.

California, Idaho and Montana seem to be the only states with statutory enactment upon the subject of mining partnership; Colorado and Arizona are the only ones which have passed a law relating to drainage; Nevada and Arizona are alone in the attempt to provide for forfeiting the interest of a co-owner for non-performance or payment of assessment work; California and Nevada, alone, have statutes on the subject of minerals found in state selections; while Utah, Washington and Wisconsin are the only ones having statutes providing for the leasing of minerals in state lands. These have all been copied at length in this Appendix.

Under the head of "Miscellaneous" will be found reference to the place in the different statutes where provisions relating generally to mining, though not essentially mining statutes, can be found. Under this head is included reference to provisions for the inspection of coal mines, eminent domain for mining, police regulations for the protection of miners and the public generally, rules to be observed in the trial of certain actions concerning mining property, penal provisions, etc.; the general aim being to give merely a reference to the statute rather than to attempt to give any of its provisions, or even the substance of it.

The numbers at the beginning of the different sections are our own, being placed there for convenience merely. The reference to the Compiled Laws, Revised Statutes or Session Laws, as the case may be, of the different states, is noted after the section title and before the body of the text, and at the end of the notes.

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These statutes have all been copied literally for the purpose of giving the reader the benefit of them as they exist, rather than as literary jewels; the language and punctuation being, as said by a prominent member of the Spokane bar, who rendered material assistance in the compilation of the statutes of Washington, "strictly legislative."

In view of the criticisms which have already appeared in the text (see text, §§ 112, 113, 114) and the sundry criticisms offered as the statutes appear in this Appendix, we will forego any further comment here.

I.

State Statutory Provisions, Annotated, of the Western Public Land States, Supplemental to the Federal Statutes, Governing the Location, Recording of, Labor or Development Work, and Proof Thereof, Upon Lode and Placer Mining Claims, Mill Sites and Tunnel Sites.

1. Relating to the Manner of Locating, Marking of Boundaries and Recording of Lode Claims.

(Laws of Colorado.)

§ 1. Length of lode claims.
2. Width of lode claims.
3. Location certificate, contents and record — Fee for recording.
4. Location certificate void unless containing certain elements.
5. Discovery shaft and preliminary notice.
6. Equivalent of discovery shaft.
7. Marking the boundaries — What acts necessary.
8. Time within which discovery shaft must be sunk.
9. Amended location certificate — Change of boundaries.
10. Relocation of abandoned claims.
11. Location certificate must describe but one claim — One claim for each locator.
12. Extra-lateral and intra-limital rights.
13. Same — Extent of rights extra-laterally.
14. Cross and uniting lodes.
15. Two lodes found to be the same.

§ 1. Length of lode claims.—(Mills' Ann. Stats., § 3148; Gen. Stats. 1883, p. 722.) The length of any lode claim

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hereafter located may equal, but not exceed fifteen hundred feet along the vein.

North Dakota.— Same. R. S. 1899, § 1426.

South Dakota.— Same. Comp. Laws Dak. Ter. 1887, § 1997, adopted by state legislature.

Utah.— A mining claim, whether located by one or more persons, may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. Act approved March 3, 1899, § 1; Laws 1899, p. 26.

Wyoming.— The length of any mining claim within Wyoming shall not exceed fifteen hundred feet, measured horizontally along such vein or lode. Nor can the regulations of any mining district limit a locator to less than this length. R. S. 1899, § 2544.

Size of lode claims discussed in text, §§ 279 *et seq.* Same, before statute, § 76.

§ 2. **Width of lode claims.**— (Mills' Ann. Stats., § 3149; Gen. Stats. 1883, p. 722.) The width of lode claims hereafter located in Gilpin, Clear Creek, Boulder and Summit counties, shall be seventy-five feet on each side of the center of the vein or crevice; and in all other counties the width of the same shall be one hundred and fifty feet on each side of the center of the vein or crevice; *provided*, that hereafter any county may, at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county, by such vote at such election, may determine upon a less width than above specified.

Idaho.— Mining claims hereafter located upon veins or lodes of quartz, or other rock in place bearing any of the metals or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States, may extend to three hundred feet on each side of the middle of the vein or lode; provided, that when the locators have set stakes, posts or monuments described in section 2557 of this chapter, to indicate the line of the vein, ledge or lode, such stakes, posts or monuments, must be taken for the purpose of such location, to mark correctly the line thereof, and such line must not afterwards be changed so as to affect rights acquired or to interfere with any location made subsequent thereto. Civ. Code 1901, § 2556.

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North Dakota.—Same as Colorado, except words "Gilpin" to "same shall be" omitted, and at end of section add: "Provided, that not less than twenty-five feet on each side of the vein or lode shall be prohibited." R. S. 1899, § 1427.

South Dakota.—The width of lode claims shall be three hundred (300) feet on each side of the center of the vein or crevice, provided, that any county may at any general election determine upon a less width than above specified, provided (same as last proviso N. Dak., *ante*). Laws Dak. Ty., § 1998, as amended by Laws S. Dak. 1899, p. 147.

Utah.— Any lode mining claim may extend three hundred feet on each side of the middle of the vein at the surface, except where adverse rights render a lesser width necessary. The end lines of each claim must be parallel. Act March 3, 1899, § 1; Laws 1899, p. 26.

Wyoming.—The width of any lode claim located within Wyoming shall not exceed three hundred feet on each side of the discovery shaft, the discovery shaft being always equally distant from the side lines of the claim. Nor can any mining district limit the locator to a width less than one hundred and fifty feet on each side of the discovery shaft. R. S. 1899, § 2545.

Size of lode claims discussed in text, § 279.

§ 3. Location certificate, contents and records — Fee for recording.—(Mills' Ann. Stats., § 3150; Gen. Stats. 1883, p. 722.) The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such claim is situated, by a location certificate, which shall contain:

1st. The name of the lode.

2d. The name of the locator.

3d. The date of location.

4th. The number of feet in length claimed on each side of the center of the discovery shaft.

5th. The general course of the lode as near as may be.

Arizona.— On the discovery of mineral in place on the public domain of the United States the same may be located as a mining claim by the discoverer for himself, or for himself and others, or for others. R. S. 1901, § 3231.

Location, how made.— Such location shall be made by erecting at or contiguous to the point of the discovery a conspicuous monument of stone not less than three feet in height, or an upright post, securely fixed, projecting at least four feet above the ground, in which monument of stone or at which post there shall be posted a location notice,

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which shall be signed by the name or names of the locator or locators. The location notice must contain:

1. The name of the claim located.

2. The name or names of the locators.

3. The date of location.

4. The length and width of the claim in feet, and the distance in feet from the point of discovery to each end of the claim.

5. The general course of the claim.

6. The locality of the claim with reference to some natural object or permanent monument whereby the claim can be identified. R. S. 1901, § 3232. See also as to record, *post*, § 5, p. 1294.

California.— The statutory requirements upon the subject of location and record of mining claims in California were similar to those of Colorado and the other western states, but inasmuch as the legislature has seen fit to repeal them, it is, of course, not necessary to copy them here. The latest mining law was passed in 1897 (Laws 1897, p. 215), and was repealed by the legislature of 1899 (Laws 1899, p. 148). This repeal, however, only reached the law relative to the location and record of lode and placer claims. The provisions relative to drainage, and miscellaneous laws relating to mining, are still in force and will be noticed further on in this Appendix.

Idaho.— *Record within ninety days.*— Within ninety days after the location of the claim, the locator or his assigns must file for record in the office of the county recorder of the county or the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location. Civ. Code 1901, sec. 2559.

Verification of recorded notice.— At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named in the same must make and subscribe an affidavit, in writing on or attached to the notice, substantially in the following form, to wit:

(Venue.) I, ———, do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such), and that I am acquainted with the mining ground described in this notice of location, and herewith called the —— ledge, lode or claim, that the ground and claim herein described or any part thereof has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in case of quartz claims) that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho. (Jurat.) Civ. Code 1901, sec. 2564.

Notice must be recorded — By whom — Fee.— The location notice herein required to be recorded must be recorded by the deputy appointed for the district, or the person appointed for that purpose as above provided (when the legal fee therefor is tendered), in a book to be

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kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. The fee to be tendered for such record, administering the oath to the locator and certifying the same, for indexing the names appearing on the notice, and to include recording the notice by the recorder as hereinafter required, and indexing by said recorder, is two dollars, which fee must be equally divided between the recorder and the deputy or other person acting under an election as herein before provided, and no additional sum of money must be demanded or received by either of them for any services connected with the recording of any location notice made pursuant to the requirements of this chapter. Civ. Code 1901, sec. 2568.

Deputy must transmit notices to recorder.— The deputy recorder of mining claims of each district, or the person temporarily appointed, as herein above provided, to make the record in case of the failure of the recorder to appoint a deputy, must at least once in each month, transmit to the recorder at the county seat, all the notices of location filed with him for record, and not previously transmitted, which must at once be recorded by said recorder, in a book to be kept in his office, and be known as the "Book of Mining Claims." The names of all persons appearing in every notice of location must be indexed by the recorder, said names being arranged in said index in alphabetical order, according to the first letter of the surname of said locators. Civ. Code 1901, sec. 2569.

Restrictions on deputy recorder.— The deputy recorders provided for in this chapter, are not, by virtue of the provisions hereof, authorized to perform any other than the special duties herein specified. They must keep an official seal, and the records in their custody are public records, but the seal of a deputy recorder must not be attached to any paper except for the purpose of authenticating certificates attached to the transcripts of the records in his custody as deputy recorder. Civ. Code 1901, sec. 2570.

Montana.— *Contents of location notice.*— Any person a citizen of the United States, or one who has declared his intention to become such, who discovers a vein or lode bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, or who discovers or locates a placer deposit of gold or other deposits of minerals, including building-stone, limestone, marble, clay, sand or other mineral substance having a commercial value, may locate a claim upon such vein, lode or deposit by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the point of discovery, which must contain:

1st. The name of the lode or claim.

2d. The name of the locator or locators.

3d. The date of the location.

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4th. If a lode claim, the number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein and the general course of the vein or lode as near as may be.

5th. If a placer or mill-site claim, the number of acres or superficial feet claimed. Rev. Pol. Code, 1895, § 3610.

Record — Verification — Contents.— Within sixty days of posting the location notice upon the claim there shall be filed in the office of the county clerk of the county in which the lode or claim is situated, a declaratory statement which shall contain:

1. The name of the lode or claim.

2. The name of the locator or locators.

3. The date of location and such description of the location of said claim with reference to some natural object or permanent monument as will identify the claim.

4 and 5 same as location certificate, *ante*.

6. The dimensions and location of the discovery shaft, cut or tunnel, or its equivalent, sunk upon lode or placer claims.

Such declaratory statement must be verified by the oath of the locator, or one of the locators, and in case of a corporation, by an officer thereof duly authorized to act. Rev. Pol. Code, 1895, § 3612, as amended, act of March 15, 1901.

Nevada.— *Location notice — Contents.*— Same as Montana, except words "bearing gold" to "having commercial value" in the body of section, "if a lode claim." in fourth subdivision, and all of fifth subdivision omitted. Act March 16, 1897, § 1; Comp. Laws 1900, § 208.

Contents of record.— Within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by a location certificate which must contain:

1, 2, 3 and 4 same as Montana, except "if a lode claim" omitted from beginning of fourth subdivision.

5. Same as sixth subdivision of Montana.

6. The location and description of each corner, with the markings thereon. . . . Act of March 16, 1897, § 3; Comp. Laws 1900, § 210.

Notices must be recorded with county recorder in all cases.— Where there is no mining district or where a district having once existed the residence of the officers within the district and their places of business within the district where the books are kept are not publicly known, district recording shall not be required of the locator or claim-owner. But recording shall be required in the office of the county recorder in all cases — as well where there is a district recorder as where there is none. Comp. Laws 1900, § 232; Laws 1899, p. 95.

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AN ACT to provide for the better preservation of the mining records of this state, and to repeal all other acts in conflict with this act.

1. *Duties of mining recorders — Duplicate notices.*— It shall be the duty of each and every mining recorder of the several mining districts of the state to require all persons locating and recording a mining claim to make a duplicate copy of each and every mining notice, which copy the said mining recorder shall carefully compare with the original, and mark "duplicate" on its face or margin, and he shall immediately deposit with or transmit the same to the county recorders of the respective counties in which said mining district may be located.

2. *Fees to be collected.*— The said district mining recorders, at the time of comparing said duplicate notices with the original, shall collect from the locators of said mining claims the sum of one dollar for each and every notice compared, which sum he shall transmit, together with the said duplicate notices, to the county recorders of the respective counties in which said mining claims shall be located.

3. *Duplicates to be filed.*— Whenever, owing to the distance of the mining district from the county seat, it becomes inconvenient for the district mining recorder to personally deposit the duplicate copy with the county recorder, then in that case he may forward the same by mail or express, or such other manner as will insure safe transit and delivery to the county recorder.

4. *Fees for recording.*— The county recorders of the several counties shall receive for their services for recording each of said duplicate notices mentioned in section two of this act, the sum of one dollar; provided, that in case the location is made outside of an organized mining district or in the absence of a mining recorder in any organized district, then the person or persons making such location shall within ninety days after making such location transmit a duplicate copy of such notice to the recorder of the county in which the location is made, and the recorder shall record the same for a fee of one dollar. As amended, Stats. 1897, p. 77.

5. *Duplicate notice to have force.*— The record of any original or duplicate notice of the location of a mining claim in the office of the county recorder, as herein provided, shall be received in evidence, and have the same force and effect in the courts of the state, as the original mining district records. Id.

6. *Penalty.*— Any person neglecting or refusing to comply with the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by such fine and imprisonment. Comp. Laws 1900, §§ 244–249.

New Mexico.— *Notice of location — Contents — Record.*— Any person or persons desiring to locate a mining claim upon a vein or lode of quartz

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or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, must distinctly mark the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location, a notice in writing stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims; and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. And provided, no other record of such notice shall be necessary. Comp. Laws 1897, § 2286; Act Jan. 11, 1876, § 1.

Probate clerk to provide books for records.— In order to carry out the intent of the preceding section, it is hereby made the duty of the probate clerk of the several counties of this territory, and they are hereby required to provide at the expense of their respective counties such book or books as may be necessary and suitable in which to enter the record hereinbefore provided for. The fees for recording such notice shall be ten cents for every one hundred words. Id., § 2287, § 2.

North Dakota.— *Contents of location certificate and record.*— Same as Colorado to subdivision 5, except "sixty days" instead of "three months," and "register of deeds" instead of "recorder."

5. The number of feet in width claimed on each side of the vein or lode.

6. Same as Colorado, subd. 5. R. S. 1899, § 1428.

Fee for recording.— The register of deeds shall be entitled to receive the sum of $1 for each location certificate recorded and certified by him and shall furnish the locator with a copy of such location certificate when demanded, for which he shall be entitled to receive fifty cents. R. S. 1899, § 1441.

Oregon.— *Who may locate — How.*— Same as Montana to "vein or lode," then "of mineral-bearing rock in place upon the unappropriated public domain of the United States within this state, may locate a claim upon such vein or lode so discovered, by posting thereon a notice of such discovery and location, which said notice shall contain:"

1, 2 and 3 same as Montana.

4. The number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said lode or vein.

5. The general course or strike of the vein or lode as nearly as may be, with reference to some natural object or permanent monument in the vicinity thereof; and by defining the boundaries upon the surface of such claim so that the same may be readily traced. Laws 1898, p. 16, § 1, as amended by Laws 1901, p. 140, § 1.

Record — Contents — Fee. — Such locator shall, within sixty days from and after the posting of location notices by him upon the lode or

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claim, file for record with the recorder of conveyances, if there be one, who shall be the custodian of mining records and miners' liens, otherwise with the clerk of the county wherein the said claim is situated, a copy of the notice so posted by him upon the lode or claim, having attached thereto an affidavit showing that the work required to be done by section 3 of this act has been done and performed, and shall pay to the recorder or clerk a fee of $1 for such record thereof, which said sum the recorder or clerk shall immediately pay over to the treasurer of such county and shall take his receipt therefor, as in case of other county funds coming into the possession of such officer. Such recorder or clerk shall immediately record such location notice and the affidavit annexed thereto. No location notice shall be entitled to record, or recorded, until the work required by section 3 of this act has been done and the affidavit in proof thereof is attached to the notice to be recorded. Laws 1898, § 2, as amended Laws 1901, p. 140, § 2.

South Dakota.— *Contents of location certificate and record.*— Same as North Dakota; then add:

"7. That when a location certificate is filed for record in the office of the register of deeds, the register of deeds shall immediately furnish to the locator or locators a certificate giving the name of the location, the name of the locator or locators, the date of filing in the office of the register of deeds; and the book and page where recorded, for which certificate the register of deeds shall receive the sum of ten cents in addition to the amount now allowed by law for filing and recording location certificates, which certificate shall be delivered to the locator or locators who shall post the same or a copy thereof, on the said claim on the same post or tree where the original notice is posted, and in a conspicuous place. And if said certificate or a copy thereof, is not so posted within ninety days from the date of the original notice, the said claim shall be deemed abandoned ground and subject to relocation by another qualified locator. The said register of deeds shall, at the time of issuing said certificate, maks a notation on the margin of the recorded certificate giving the date of the delivery of said certificate, which notation shall be *prima facie* evidence of the delivery and posting of the same as herein provided." Comp. Laws Dak. Ty. 1887, as amended by Laws S. Dak. 1899, p. 147.

Fees of county recorder for recording mining location.— The register of deeds of each county is entitled to one dollar for each location certificate recorded and certified by him, and to fifty cents for each certified copy. Comp. Laws Dak. Ty., § 2012.

Utah.— *Contents of location notice — Monument.*— The locator, at the time of making the discovery of such vein or lode, must erect a monument at the place of discovery, and post thereon his notice of location, which shall contain:

1, 2, 3 and 4 same as Montana, then add at end of 4, "and such a de-

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scription of the claim, located by reference to some natural object or permanent monument as will identify the claim."

5. If a placer or mill-site claim, the number of acres or superficial feet claimed, and such a description of the claim or mill site located by reference to some natural object or permanent monument as will identify the claim or mill site. Act March 3, 1899, § 2; Laws 1899, p. 26.

Contents of record — Fee.— Within thirty days from the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the officer of the county recorder of the county in which such claim is situated, if said claim be situated without and beyond an original mining district, a substantial copy of such notice of location. Such county recorder shall charge and collect a fee of seventy-five cents for filing and recording and indexing and abstracting such notice; provided, that such notice of location shall not be abstracted unless a subsequent conveyance affecting the same property be filed for record, when said notice shall be abstracted. Act March 3, 1899, § 4; Laws 1899, p. 26.

Reorganization of mining district.— Mining districts may be organized, and all existing districts may be reorganized and the rules and regulations of the said mining district shall govern the said district according to the laws of the United States, in cases where a district organization is desired; provided, that the nearest boundary line of any mining district shall not be within ten miles from the county recorder's office of any county. Act approved March 3, 1899, § 7; Laws of 1899, p. 27.

Copying records — Expense.— Upon application of the district mining recorder of any mining district to the board of county commissioners of the county having in custody the records of the said mining district, the said board of county commissioners shall cause the records of said district to be copied by the county recorder and shall cause all records of documents pertaining to district mining records, recorded since June 4, 1896, up to the time of delivery, to be recorded in the original records of the mining district in which the property is situated and the original records when so amended, shall be delivered to such district mining recorder. The copy so made shall remain in the office of the county recorder, and shall be considered as the original record. One-half of the expense of copying such records shall be paid out of the county treasury and one-half shall be paid out of the state treasury. Act approved March 3, 1899, § 8; Laws of 1899, p. 27.

Duplicate notice of location — Fee — Penalty.— It shall be the duty of every district mining recorder to require every person depositing for record a notice of location to make a duplicate copy thereof, which copy said mining recorder shall carefully compare with the original and mark "duplicate" and indorse thereon his name, and the date and hour and fact of filing in his office of the original. He shall, at the

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time of filing the duplicate notice with the original, collect, in addition to his own fee, the sum of seventy-five cents, which shall be the fee for the county recorder for recording such duplicate. He shall immediately deposit the duplicate copy with the county recorder of the county in which the greater part of the said mining district is located for record, or forward the same to him by mail or express, or in such other manner as will insure safe transit and delivery. The fee of seventy-five cents shall accompany the duplicate. The county recorder shall record said duplicate with the indorsements thereon for said fee. The record of said duplicate notice in the office of the county recorder shall be considered an original record. Every person neglecting or refusing to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. Act approved March 3, 1899, § 9; Laws of 1899, p. 28.

County recorder may make certified copies of district records — Receivable as evidence.— Where books, records and documents pertaining to the office of district mining recorder have been or shall hereafter be deposited in the office of any county recorder of this state, such county recorder is authorized to make and certify copies therefrom, and such certified copies shall be receivable in all tribunals and before all officers of this state in the same manner and to the same effect as if such records had been originally filed or made in the office of the county recorder. Act approved March 3, 1899, § 11; Laws of 1899, p. 28.

County recorder to record rules — Certified copies.— It shall be the duty of each county recorder to record the mining rules and regulations of the several mining districts in his county without fee, and certified copies of such records shall be received in all tribunals and before all officers of this state as *prima facie* evidence of such rules and regulations, and it shall be his duty to record, index and abstract all mining location notices presented for record, for a fee not to exceed seventy-five cents for each notice and to file and index all affidavits of labor presented for filing affecting one mining claim for a fee not to exceed twenty-five cents; provided, that when an affidavit of labor contains the name of more than one mining claim, an additional fee of ten cents shall be charged for each additional claim named therein. Act approved March 3, 1899, § 12; Laws 1899, p. 28.

Recorder of mining district to give bond.— The recorder of each mining district shall take the oath of office and give bond with sureties in the penal sum of $1,000. Such bond must be approved by the district judge and filed in the office of the county clerk of the county in which the greater part of the said mining district is located. Where the recorder of any mining district appoints a deputy, the recorder and his bondsmen shall be responsible for the official acts of such deputy. Act approved March 3, 1899, § 13; Laws 1889, p. 29.

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District recorder to make copies.— It shall be the duty of the recorder of a mining district upon request and payment or tender of the fees therefor, to make and deliver to any person requesting the same, duly certified copies of any records in his custody and for a failure so to do, or for receiving larger fees for any such service than those provided he shall be deemed guilty of a misdemeanor. Act approved March 3, 1899, § 14; Laws 1899, p. 29.

Vacancy — County recorder to receive records.— Whenever there is a vacancy in the office of recorder of any mining district, or the person holding such office shall remove from the district, leaving therein no qualified successor in office; or whenever from any cause there is no person in such district authorized to retain the custody and give certified copies of the records, it shall be the duty of the person having custody of the records to deposit the same in the office of the county recorder of the county in which such mining district or the greater part thereof is situated, and the county recorder shall receive such records and is hereby authorized to make and certify copies therefrom, and such certified copies shall be received in evidence in all courts, and before all officers and tribunals. The production of a certified copy so made, shall be, without other proof, evidence that such records were properly in the custody of the county recorder. Act approved March 3, 1899; Laws 1899, p. 29.

Fees of mining recorder.— Every mining recorder shall be allowed the same fees for recording and making copies of any record in his custody as are allowed by law to county recorders for similar services; provided, that fees for recording location notices may equal but shall not exceed $1 for each notice. Act approved March 3, 1899, § 16; Laws 1899, p. 29.

Washington.— *Record and contents.*— The discoverer of a lode shall within ninety (90) days from the date of discovery, record in the office of the auditor of the county in which the lode is found, a notice containing the name or names of the locators, the date of location, the number of feet in length claimed on each side of the discovery, the general course of the lode and such description of the claim or claims located by reference to some natural object or permanent monument as will, identify the claim. Act March 8, 1899, sec. 1, Laws 1899, p. 69. See also *post*, § 5.

The Washington statutes also permit the miners of a district to elect a district recorder whose records of location notices and transfers are deemed public. Hill's Ann. Stats., §§ 2214–15.

Wyoming.— *Record — Contents.*— The discoverer of any mineral, lead, lode, ledge or vein, shall, within sixty days from the date of discovery, cause such claim to be recorded in the office of the county clerk and *ex officio* register of deeds of the county within which such claim

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may exist, by a location certificate which shall contain the following facts:

1. The name of the lode claim.

2. The name or names of the locator or locators.

3. The date of location.

4. The length of the claim along the vein measured each way from the center of the discovery shaft, and the general course of the vein as far as it is known.

5. The amount of surface ground claimed on either side of the center of the discovery shaft or discovery workings.

6. A description of the claim by such designation of natural or fixed object, or if upon ground surveyed by the United States system of land survey, by reference to section or quarter section corners, as shall identify the claim beyond question. R. S. 1899, § 2546. See *post*, § 5, p. 1296.

Necessity for verification discussed, text, §§ 420–22.

Contents of location notice discussed, text, §§ 365–377.

Contents of record discussed, text, §§ 403–423.

§ 4. Location certificate void unless containing certain elements.— (Mills' Ann. Stats., § 3151; Gen. Stats. 1883, p. 722.) Any location certificate which shall not contain the name of the lode, the name of the locator, the date of location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

Arizona.— Until each and all the above specified things (Ariz. note to § 3, *ante*, p. 1283) shall have been done, no right thereto shall have been acquired. R. S. 1901, § 3283.

The failure to do all the things enumerated in this section in the time and place specified shall be construed into an abandonment of the claim, and all right and claim thereto of the discoverer and locator shall be forfeited. Id., § 3285.

NOTE.— This undoubtedly refers to the previous section when it says "this section," another evidence that state legislators do not always say just what they mean.

Nevada.— Any record of the location of a lode mining claim which does not contain all the requirements named in this section shall be void. All records of lode or placer mining claims, mill-sites or tunnel rights heretofore made by any recorder of any mining district or any county recorder are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this act. And any such record, or a copy thereof, duly verified by a mining

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recorder shall be *prima facie* evidence of the facts therein stated. Comp. Laws, 1900, § 210; Act March 16, 1897, § 3.

North Dakota.— Same as Colorado, except "the number of feet in width claimed" inserted between "discovery shaft" and "the general course." R. S. 1899, § 1429.

Oregon.— Any and all locations or attempted locations of quartz mining claims within this state, subsequent to the thirty-first day of December, 1898, that shall not comply and be in accordance with the provisions of this act, shall be null and void. Sess. Laws 1898, p. 16, § 10.

South Dakota.— Same as North Dakota. Comp. Laws Dak. Ter., 1887, § 2000, as adopted by state legislature.

Wyoming.— Any certificate of location which shall not contain all the requirements in the preceding section, together with such other description as shall identify the lode or claim with reasonable certainty, shall be void. R. S. 1899, § 2547.

§ 5. **Discovery shaft and preliminary notice.**— (Mills' Ann. Stats., § 3152; Gen. Stats. 1883, p. 723.) Before filing such location certificate, the discoverer shall locate his claim by:

First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice;

Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery;

Third. By marking the surface boundaries of the claim.

Arizona.— *Time to complete location.*— From the time of location of a mining claim, as above specified, the locator shall be allowed ninety days within which to do or cause to be done the following things:

1. To cause to be recorded in the office of the county recorder of the county in which the claim is situated a copy of the location notice. (See also Ariz. note to § 16, p. 1308, *post.*)

2. Same as subd. 1, Colorado, to "if necessary," then "until there is disclosed in said shaft mineral in place."

3. To monument the claim on the ground so that its boundaries can be readily traced. R. S. 1901, § 3234.

Fee for recording.— There shall be a uniform fee of one dollar charged by each county recorder in the territory of Arizona for recording each notice of location of a mining claim, including certificate of work done to comply with the law regarding locations, the said one dollar to be in

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full for filing, recording and indexing said notice and certificate and certifying to same under seal. R. S. 1901, § 3259.

Idaho.— *Discovery shaft.*—Within sixty days after such location, the locator or his assigns, must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface. And of not less than sixteen square feet area. . . . Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to relocation for a period of ninety days from and after the date of location. Civ. Code 1901, § 2558.

Montana.— Before the expiration of sixty days from the date of posting such notice upon the claim the locator or locators must sink a discovery shaft upon the lode or claim (mill site claims excepted) to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well defined crevice or valuable deposit. Its equivalent in work must be done upon placer claims. . . . Rev. Pol. Code 1895, § 3611, as amended by Act of March 15, 1901, § 1.

Nevada.— Before the expiration of ninety days from the posting of such notice upon the claim the locator must sink a discovery shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show by such work a lode deposit of mineral in place. . . . Act of March 16, 1897, § 2; Comp. Laws 1900, § 209, as amended by Laws 1901, p. 97.

Discovery work on placers.— Within ninety days after the posting of the notice of location of a placer claim, the locator shall perform not less than twenty dollars' worth of labor upon the claim for the development thereof, and shall have recorded by the mining district recorder and the county recorder of the district and county in which the claim is situated a certificate which shall state the name of the claim, designating it as a placer claim, name of locator or locators, date of location, number of feet or acres claimed, a description of the claim with regard to some natural object or permanent monument, so as to identify the claim, and the kind and amount of work done by him as herein required, and the place on the claim where said work was done. This certificate, or the record thereof, or a duly certified copy of said record, shall be *prima facie* evidence of the recitals therein. But if such certificate do not state all the facts herein required to be stated, it shall be void. As amended, Stats. 1899, p. 94; Comp. Laws 1900, § 221.

New Mexico.— That the locator or locators of any mining claim, located after this act shall take effect, shall, within ninety days from the date of taking possession of the same, sink a discovery shaft upon such claim, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit, or open cut upon such claim, to at least ten feet below the surface, exposing mineral in place. Comp. Laws 1897, § 2298; Act Feb. 11, 1887, § 5.

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North Dakota.— Before filing such location certificate the discoverer shall:

1. Locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined mineral vein or lode.

2. Same as subd. 2, Colorado, then add: "the number of feet claimed in length on either side of the discovery and the number of feet in width claimed on each side of the lode."

3. Same as Colorado. R. S. 1899, § 1430.

Oregon.— *Discovery shaft.*— Before the expiration of sixty days from the date of the posting of the notice of discovery upon his claim as aforesaid, and before recording the notice of location as required by section 2 of this act, the locator must sink a discovery shaft upon the claim located to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode or vein of mineral deposit in place. . . Such work shall not be deemed a part of the assessment work required by the Revised Statutes of the United States. The locator, or some one for him who did work upon and has knowledge of the facts relating to the sinking of the discovery shaft, shall make and attach to the copy of the notice of location to be recorded, an affidavit showing the compliance by the locator with the provisions of this section, this affidavit shall be recorded with such copy of the location notice. Laws 1898, p. 16, § 3, as amended Laws 1901, p. 140.

South Dakota.— Before filing such location certificate, the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined mineral vein or lode, not less than ten (10) feet in depth on the lowest side; second and third same as North Dakota. Comp. Laws Dak. Ty. 1887, as adopted by state legislature, § 2001.

Washington. — See Washington note, § 7, p. 1300, *post*, marking boundaries.

Wyoming.— *Discovery shaft — Posting notice.*— Before the filing of a location certificate in the office of the county clerk and *ex officio* register of deeds, the discoverer of any lode, vein or fissure shall designate the location thereof as follows:

1. By sinking a shaft upon the discovery lode or fissure to the depth of ten feet from the lowest part of the rim of such shaft at the surface.

2. By posting at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode or claim, the name of the discoverer and locator and the date of said discovery. R. S. 1899, § 2539, subds. 1 and 2.

This question discussed in text, §§ 346–360, especially § 352.

§ 6. Equivalent of discovery shaft.— (Mills' Ann. Stats., § 3154; Gen. Stats. 1883, p. 723.) Any open cut or tunnel, which shall cut a lode at the depth of ten feet below the sur-

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face, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.

Arizona.— Any open cut, adit or tunnel which shall be made as above provided for, as a part of the location of a lode mining claim, and which shall be equal in amount of work to a shaft ten feet deep and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of ten feet from the surface, shall be equivalent, as a discovery work, to a shaft sunk from the surface. R. S. 1901, § 3287.

Idaho.— Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent shall be considered a compliance with this provision. Civ. Code 1901, § 2558.

Montana.— A cut, cross-cut or tunnel which cuts the lode at the depth of ten feet below the surface or an open cut at least ten feet in length along the lode from the point where the lead may be in any manner discovered, is equivalent to a discovery shaft. . . . Rev. Pol. Code 1895, § 3611, as amended, Act March 15, 1901, § 1.

Nevada.— A cut or cross-cut, or tunnel, which cuts the lode at the depth of ten feet or an open cut along the ledge or lode equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft. . . . Act March 16, 1897, § 2; Comp. Laws 1900, § 209, as amended, 1901, p. 97.

New Mexico.— See New Mexico note, § 5, p. 1295, *ante*.

North Dakota.— Any open cut, cross-cut or tunnel at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, etc. R. S. 1899, § 1432.

Oregon.— A cut or cross-cut or tunnel which cuts the lode at a depth of ten feet or an open cut at least six feet deep, four feet wide and ten feet in length along the lode from the point. Same as Colorado beginning with "where." Laws 1898, p. 16, as amended by Laws 1901, p. 140, § 3.

South Dakota.— Any open cut, cross or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit, then same as Colorado. Comp. Laws Dak. Ty. 1887, as amended by Laws S. D. 1899, p. 147.

Washington.— Any open cut or tunnel having a length of ten (10) feet, which shall cut a lode at the depth of ten (10) feet below the surface, shall hold such lode the same as if a discovery were sunk thereon, and shall be equivalent thereto. Act March 8, 1899; Laws 1899, p. 69, § 3.

Limited application.— The provision herein relating to discovery shafts, shall not apply to any mining location west of the summit of the Cascade mountains. Id., § 9.

Definition of lode.— The term "lode" as used in this act shall be construed to mean ledge, vein or deposit. Id., § 4.

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Wyoming.— *What equivalent to discovery shaft.*— Any open cut which shall cut the vein ten feet in length and with face ten feet in height, or any cross-cut tunnel, or tunnel on the vein ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, shall hold such lode the same as if a discovery shaft were sunk thereon. R. S. 1899, § 2549.

See text, §§ 346–360.

Effect of loss of discovery, § 351.

§ 7. Marking the boundaries — What acts necessary.— (Mills' Ann. Stats., § 3153; Gen. Stats. 1883, p. 723.) Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit: one at each corner and one at the center of each side line. When it is practically impossible on account of bedrock to sink such posts, they may be placed in a pile of stones, and where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place.

Arizona.— Such surface boundaries shall be marked by six substantial posts projecting at least four feet above the surface of the ground, or by substantial stone monuments at least three feet high, to wit: one at each corner of said claim and one at the center of each end line thereof. R. S. 1901, § 3236.

Idaho.— The locator, at the time of making the discovery of such vein or lode, must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof, and at any angle in the side lines, a monument, marked with the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated:

First. The name of the locator;

Second. The name of the claim;

Third. The date of discovery;

Fourth. The direction and distance claimed along the ledge from the discovery;

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Fifth. The distance claimed on each side of the middle of the ledge;

Sixth. The distance and direction from the discovery monument. to such natural object or permanent monument, if any such there be, as will fix and describe the notice itself, the location of the claim; and

Seventh. The name of the mining district, county and state.

When from any cause a monument cannot be safely planted at the true corner or angle, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle.

Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing towards the discovery, and must be at least four inches square or in diameter. Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim, he may do so in any direction that will not interfere with the rights or claims which existed prior to his discovery. Civ. Code 1901, sec. 2557.

Montana.—The locator or locators must within thirty days after posting notice of location aforesaid define the boundaries of his or their claim, by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim. When a post is used it must be at least four inches square by four feet six inches in length, and set one foot in the ground, with mound of earth or stone at least four feet in diameter by two feet in height around the post. When a stone is used, not a rock in place, it must be at least six inches square and eighteen inches in length, set two-thirds of its length in the ground, which trees, stakes or monuments, must be so marked as to designate the corners. Rev. Pol. Code, 1895, § 3611, as amended, Act March 15, 1901, § 1.

Boundaries established by deputy mineral surveyor — Effect of.— When a locator or owner of a mining claim has the boundaries and corners of his claim established by a United States deputy mineral surveyor, and his claim connected with a corner of the public or minor surveys, or an established initial point, and incorporates into the declaratory statement the field notes of such survey, and attaches to and files with such declaratory statement a certificate by the surveyor setting forth: First, that such survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the locators thereof; third, that the description incorporated in the declaratory statement is sufficient to identify the claim,—such survey and certificate become a part of the declaratory statement and such declaratory statement is *prima facie* evidence of the facts therein contained. Rev. Pol. Code 1895, § 3616.

Nevada.— *How boundaries marked.*—The locator must define the boundaries of his claim by marking a tree or rock in place, or by setting a post or stone, one at each corner and one at the center of each

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side line. Then same as Montana, except that between words "around the post" and "when a stone is used," is inserted: "When it is practically impossible on account of bedrock or precipitous ground to sink such posts, they may be placed in a pile of stones; or where the proper placing of such posts or monuments of stone is impracticable or dangerous to life and limb, it shall be lawful to place such post or monument of stone at the nearest point, properly marked to designate its right place." Comp. Laws of 1900, § 209, as amended 1901, p. 97, § 1.

Boundaries established by deputy mineral surveyor.—This provision is the same as Montana, except "owner of a mining claim" in place of "or his assigns," and after "deputy mineral surveyor" insert "or a licensed surveyor of this state," and instead of "declaratory statement" in last paragraph insert "record." Comp. Laws of 1900, § 215; Act March 16, 1897, § 8.

New Mexico.—The surface bounderies (boundaries) of mining claims hereafter located shall be marked by four substantial posts or monuments, one at each corner of such claim, so as to distinctly mark the claim on the ground, so that its bounderies (boundaries) can be readily traced, and shall otherwise conform to section 2286 of the Compiled Laws of 1897. R. S. 1897, § 2299, as amended, Act March 16, 1899, § 1.

North Dakota.—Such surface boundaries shall be marked by eight substantial posts hewed or blazed on the side facing the claim and plainly marked with the name of the lode and the corner, end or side of the claim that they respectively represent and sunk in the ground as follows: One at the corner and one at the center of each side line and one at each end of the lode. When it is impracticable on account of rock or precipitous ground to sink such posts, they may be placed in a monument of stone. R. S. 1899, § 1481.

Oregon.—Such boundaries shall be marked within thirty days after posting such notice by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone, or earth and stone, at least two feet in height, to wit: One such post or mound of rock at each corner and at the center ends of such claim. Laws of 1898, § 1, p. 16, as amended 1901, p. 140, § 1.

South Dakota.—Same as North Dakota, except "to wit" instead of "as follows." Comp. Laws Dak. Ty. 1887, as adopted by state legislature, § 2002.

Utah.—Mining claims and mill sites must be distinctly marked on the ground so that the boundaries thereof can be readily traced. Act March 3, 1899, § 3, Laws 1899, p. 26.

Washington.—Before filing such notice for record, the discoverer shall locate his claim by first sinking a discovery shaft upon the lode, to the depth of ten (10) feet from the lowest part of the rim of such shaft at the surface, and shall post at the discovery at the time of discovery

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a notice containing the name of the lode, the name of the locator or locators, the date of discovery, and shall mark the surface boundaries of the claim by placing substantial posts or stone monuments bearing the name of the lode and date of location; one post or monument must appear at each corner of such claim; such posts or monuments must be not less than three (3) feet high; if posts are used they shall not be less than four (4) inches in diameter and shall be set in the ground in a substantial manner. If such claim be located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees marked or blazed in the lines of such claim to indicate the location of such lines. Act March 8, 1899, § 2, Laws 1899, p. 69.

Wyoming. — Same as Colorado, except language partially transposed, then add at end, "provided, that no right to such lode claim, or its possession or enjoyment, shall be given to any person or persons, unless such person or persons shall discover in said claim mineral-bearing rock in place." R. S. 1899, § 2548, subd. 3.

See discussion of this subject, text, §§ 381–400.

§ 8. Time within which discovery shaft must be sunk. (Mills' Ann. Stats., § 3155; Gen. Stats. 1883, p. 723.) The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon.

Arizona.— Within ninety days. R. S. 1901, § 3259. See Ariz. note, *ante*, § 5, p. 1294.

Idaho.—Within sixty days. Civ. Code 1901, § 2558.

Montana.— Montana note, *ante*, § 5, p. 1295.

Nevada.— Id.

New Mexico.— Id.

North Dakota.— Same as Colorado. R. S. 1899, § 1433.

Oregon.— See Oregon note, § 5, p. 1296, *ante*.

South Dakota.— Same as Colorado. Comp. Laws Dak. Ty. 1887, adopted by state legislature, § 2004.

Washington.— See Washington note, § 7, p. 1300, *ante*.

Wyoming.— Same as Colorado, except after "mineral lode," insert "or vein in this state." R. S. 1899, § 2550.

§ 9. Amended location certificate — Change of boundaries. — (Mills' Ann. Stats., § 3160; Gen. Stats. 1883, p. 724.) If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which

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has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act; *provided*, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous locations.

Arizona.— Location notices may be amended at any time and the monuments changed to correspond with the amended location: Provided, that no change shall be made that will interfere with the rights of others. R. S. 1901, § 3238.

Idaho.— Same as Colorado to "conditions of this act," then "and to contain all that this act required an original certificate to contain: Provided that such amended location does not interfere with the existing rights of others at the time when such amendment is made." Civ. Code 1901, § 2566.

Nevada.— Same as Colorado. Comp. Laws 1900, § 213; Act March 16, 1897, § 6.

New Mexico.— Same as Colorado, except "owner" instead of "locator," and instead of "certificate" insert "location notice;" after "may file," before "additional," insert "in the office where notices of location are by law required to be filed, an amendment or;" in the proviso instead of "relocation" insert "additional or amended notice of location," and instead of "relocation" the second time insert "filing such notice;" instead of "or claimants" insert "his assigns." Comp. Laws 1897, § 2301.

North Dakota.— Same as Colorado, except word "chapter" is used instead of "act." R. S. 1899, § 1437.

South Dakota.— Same as Colorado. Comp. Laws Dak. Ty. 1887, as adopted by state legislature, § 2008.

Washington.— Same as Colorado, except "additional ground which is subject to location," instead of "overlapping claim which has been abandoned;" after words "may file" add "an amended certificate of location, subject to the provisions of this act regarding the making of new locations." Act March 8, 1899, § 5, Laws 1899, p. 69.

Wyoming.— Same as Colorado, except "changing the surface boundaries of his or their original claim or location," instead of "changing his surface boundaries," and "March 6, 1888," instead of "this law," inserted. R. S. 1899, § 2538.

The question of amended location certificates and the right of the locator to file them is discused in the text, § 425 *et seq.*, also §§ 394, 395.

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§ 10. Relocation of abandoned claims. — (Mills' Ann. Stats., § 3162; Gen. Stats. 1883, p. 725.) The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts, if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim be taken, the location certificate may state that the whole or any part of the new location is located as abandoned property.

Arizona.—The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing the boundaries in the same manner and to the same extent as is required in making an original location; or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of the commencement of such location, and shall erect new, or make the old monuments the same as originally required. In either case a new location monument shall be erected, and the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be void. R. S. 1901, sec. 3241.

Idaho.— The location of abandoned claims shall be done in the same manner as if the location were of a new claim; but the locator may, instead of sinking a new discovery shaft, sink the original discovery shaft ten feet deeper than it was at the time of his location, or he may drive the open cut, or tunnel ten feet further along the course of the lead, lode or vein, and must erect new posts or monuments. Civ. Code 1901, sec. 2560.

Montana.— Same as Colorado to "ten feet deeper," then "in which case the declaratory statement must give the depth and dimensions of the original discovery shaft at the date of such relocation. In any case, whether the whole or a part of an abandoned claim is taken, the declaratory statement may state that the whole or any part of the new location is located as abandoned property. If it is not known to the locator that his location is on an abandoned claim, then the provisions of this section does not apply." Rev. Pol. Code 1895, sec. 3615.

Nevada.— Same as Colorado to "time of abandonment," then add: "in which case the record must give the depth and dimensions of the original discovery shaft at the date of such relocation," then same as Colorado to end; then add: "If it is not known to locator," etc., same as

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Montana. Comp. Laws 1900, sec. 214, Act March 16, 1897, sec. 7. See last paragraph Nevada note to § 18, p. 1312, *post*.

New Mexico.— The relocation of any mining ground which is subject to relocation, shall be made in the same way as an original location is required by law to be made, except the relocator may sink a new shaft upon the ground relocated to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or drive a new tunnel, adit, or open cut upon such ground, at least ten feet below the surface exposing mineral in place, or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of relocation, or drive the original tunnel, adit, or open cut upon such claim, ten feet further. Comp. Laws 1897, sec. 2300.

North Dakota.—Same as Colorado, except after "original shaft" and before "and erect new," insert. "cut, or adit to a sufficient depth to comply with sections 1430 and 1434." R. S. 1899, sec. 1439.

Oregon.— Abandoned claims shall be deemed unappropriated mineral lands, and titles thereto shall be obtained as in this act specified without reference to any work previously done thereon. Laws 1898, p. 16.

South Dakota.— Same as North Dakota, except "sections 2001 and 2003," instead of "sections 1430 and 1434." Comp. Laws Dak. Ty. 1887, as adopted by state legislature, sec. 2010.

Washington.— Same as Colorado to "ten feet deeper," then: "than it was at the date of the commencement of such location, and shall make new, or mark the old monuments the same as originally required." and (then same as Colorado beginning with "in either case"). Act March 8, 1899, sec. 8, Laws 1899, p. 69.

Wyoming.— Any abandoned lode, vein or strata claim may be relocated, and such relocation shall be perfected by sinking a new discovery shaft and by fixing new boundaries in the same manner as provided for the location of a new claim. Then same as Colorado beginning with "or the relocator," except the last word is "claim" instead of "property." R. S. 1899, § 2552.

Location of abandoned property is treated in the text, § 259.

For New Mexico provision on abandonment, see *post*, § 63, p. 1338, New Mexico note.

Only unoccupied lands locatable, § 154.

Overlapping claims, §§ 509, 512, 540.

§ 11. Location certificate must describe but one claim— One claim for each locator.— (Mills' Ann. Stats., § 3163; Gen. Stats. 1883, p. 725.) No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location it shall be absolutely void, except as to the first location therein described, and if they are described

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together, or so that it cannot be told which location is first described, the certificate shall be void as to all.

Idaho.— Same as Colorado to "absolutely void." Civ. Code 1901, § 2561.

Nevada.— Same as Colorado. Comp. Laws 1900, § 219; Act March 16, 1897, § 12.

North Dakota.— Same as Colorado. R. S. 1899, § 1440.

Oregon.— *But one claim for each locator.*— Any person may hold one claim by location, as hereinbefore provided, upon each lead or vein, and as many by purchase as the local laws of the miners in the district where such claims are located may allow; and the discoverer of any lead or vein not previously located upon shall be allowed one additional claim for the discovery thereof. Nothing in this section shall be so construed as to allow any person, not the discoverer, to locate more than one claim upon any lead or vein. Hill's Ann. Laws, 1892, § 3829.

South Dakota.— Same as Colorado. Comp. Laws Dak. Ty. 1887, adopted by state legislature, § 2011.

Wyoming.— Same as Colorado, except "more" instead of "several," before "locators;" then, "and any location certificate that contains upon its face more than one location claim shall be absolutely void;" then same as Colorado, beginning with "except as" to end, except an "entirety" instead of "as to all." R. S. 1899, § 2589.

This kind of legislation is criticised in the text, § 114. See also §§ 112 and 113, 397, 398.

§ 12. Extra-lateral and intra-limital rights.— (Mills' Ann. Stats., § 3156; Gen. Stats. 1883, p. 723.) The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward, vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode.

Nevada.— Same as Colorado, except "record of any vein or," instead of "location certificate" at beginning, and "veins" instead of "ledges" after "lodes or" and before "beyond the end lines." Comp. Laws 1900, § 211; Act March 16, 1897, § 4.

North Dakota.— Same as Colorado. R. S. 1899, § 1434.

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South Dakota.— Same as Colorado. Comp. Laws Dak. Ty. 1887, as adopted by state legislature, § 2005.

Wyoming.— The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize a locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. R. S. 1899, § 2551.

§ 13. Same — Extent of rights extra-laterally.— (Mills' Ann. Stats., § 3156; Gen. Stats. 1883, p. 724.) If the top or apex of a lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior lines.

Nevada.— Same as Colorado, except "beyond the point" omitted between "course" and "where." Comp. Laws of 1900, § 212; Act March 16, 1897, § 5.

North Dakota.— Same as Colorado. R. S. 1899, § 1435.

South Dakota.— Same as Colorado. Comp. Laws Dak. Ty. 1887, as adopted by state legislature, § 2006.

The power of state legislatures to enact such provisions as this, the preceding and succeeding section, is questioned in the text. See especially § 114; see also §§ 112, 113, 481.

§ 14. Cross and uniting lodes.— (Mills' Ann. Stats., § 3142; Gen. Stats. 1883, p. 721.) When it shall appear that one lode crosses, runs into, or unites with any other lode, the priority of record shall determine the rights of claimants; *provided*, that in no case where it appears that two lodes have crossed one another, shall the priority of record give

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any person the privilege of turning off from the crevice or lode which continues in the same direction of the main lode upon which he or they may have recorded their claim or claims; but such person or persons shall, at all times, follow the crevice running nearest in the general direction of the main lode upon which he or they may have recorded their claim or claims.

Colorado is the only state having this provision.

§ 15. Two lodes found to be the same — Rights of locators.— (Mills' Ann. Stats., § 3143; Gen. Stats. 1883, p. 721.) Where two crevices are discovered at a distance from each other and known by different names, and it shall appear that the two are one and the same lode, the persons having recorded on the first discovered lode shall be the legal owners.

This is another statutory gem for which Colorado is the sole agent.

2. REGULATING THE LOCATION, MARKING OF BOUNDARIES AND RECORD OF PLACER CLAIMS.

(Laws of Colorado.)

§ 16. Location of placers — Marking boundaries — Location certificate — Record.

§ 16. Location of placers — Marking boundaries — Location certificate — Record.— (Mills' Ann. Stats., § 3136; Gen. Stats. 1883, p. 718.) The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is situated, by a location certificate, which shall contain:

1st. The name of the claim, designating it as a placer claim.

2d. The name of the locator.

3d. The date of location.

4th. The number of acres or feet claimed, and

5th. A description of the claim by such reference to natural objects or permanent monuments as shall identify the claim. Before filing such location certificate, the dis-

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coverer shall locate his claim: First, by posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed. Second, by marking the surface boundaries with substantial posts, and sunk in the ground, to wit: one at each angle of the claim.

The provisions of the Colorado statute relative to amended location certificates, number of claims included in one location certificate, and preliminary work apply equally to lode and placer claims. See *ante*, §§ 2 to 6, pp. 1282–1297, inclusive, also §§ 9 and 11, pp. 1301, 1304.

Arizona.—*Location of placers.*— The locator of a placer mining claim shall locate his claim in the following manner: By posting a location notice thereon containing the name of the claim, the name of the locator or locators, the date of location, and the number of acres claimed, a description of the claim with reference to some natural object or permanent monument that will identify the claim by marking the boundaries of his claim with a post or monument of stone at each angle of the claim located. When a post is used it must be at least four inches by four feet six inches in length, set one foot in the ground and surrounded by a mound of stone or earth. R. S. 1901, § 3242.

Monuments, how placed.— When it is practically impossible on account of a bed of rock or precipitous ground to sink such posts, they may be placed in a pile of stones. And if for any reason it is impossible to erect and maintain a post or monument of stone at any angle of such claim, a witness post or monument may be used, said witness monument to be placed as near the true corner as the nature of the ground will permit. When a mound of stone is used, it must be at least three feet in height and four feet in diameter at the base. R. S. 1901, § 3243.

Notice to be recorded.— The locator of any placer claim shall, within sixty days after the date of location of such claim, have a copy of the location notice (of the) claim recorded in the office of the county recorder of the county in which said placer claim is situated. Any record of the location of a placer mining claim which shall not contain all the requirements of this section shall be void. R. S. 1901, § 3244.

Recorders to procure books for records.— The county recorders of the several counties are authorized and required to procure suitable books in which the records of all mines and mineral deposits shall be kept, which said books shall be paid for out of the county treasury. R. S. 1901, § 3250.

Previous location not affected.— Nothing in this act shall be so construed as to affect the claims to mines and mineral deposits heretofore located and duly recorded. R. S. 1901, § 3251.

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Idaho. — Placer claims as mentioned in section 2329 of the Revised Statutes of the United States may be located for the purpose of mining deposits and precious stones after the discovery of such deposits. Civ. Code 1901, § 2562.

How located.— The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones, must at the time of making the location, place a substantial post or monument as is required in the location of quartz claims at each corner of the location and must also post on one of the same a notice of location containing the date of location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe, in the notice itself, the location of the claim. Within fifteen days after making the location, the locator must make an excavation upon the claim of not less than one hundred cubic feet, for the purpose of prospecting the same. Within thirty days after the location, the locator must file for record in the office of the county recorder of the county or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his copy of notice of location, to which must be attached an affidavit such as is required in the case of quartz claims. Civ. Code 1901, § 2563.

County recorders to appoint deputies at certain places. — For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where he may deem it necessary, and at all places more than twenty miles distant from an existing office whenever ten or more mining locators interested, petition for the appointment of a deputy. Upon failure of any recorder to appoint a deputy for ten days after the petition in writing has been presented to him, the resident miners in such district may appoint temporarily one of their number to act as the recorder for the district, whose record shall be as valid as if made by the deputy, and must be entered by the recorder as hereinafter required: Provided, that whenever at any time afterwards, the recorder has appointed a deputy for such district or place, the authority of the person elected by the resident miners ceases. Id., § 2567.

Montana.— The provisions of the Montana statute relative to the location, marking boundaries and recording mining claims, apply alike to lodes and placers. See Montana note to §§ 3 and 5, pp. 1285, 1295, *ante.*

Placer locations and records thereof prior to 1895 validated.— All placer mining locations or locations of valuable mineral deposits, which have heretofore been recorded in the office of the county clerk or recorder, have the same force and effect as though such records had been authorized by law, except in cases where the rights of third persons had been acquired before the passage of this code; and such record is en-

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titled to be admitted in evidence in any court. Rev. Pol. Code 1895, § 3618.

Nevada.— *How placer claims located.*— The location of a placer claim shall be made in the following manner: By posting thereon, upon a tree, rock in place, stone, post, or monument, a notice of location, containing the name of the claim, name of locator or locators, date of location, and number of feet or acres claimed, and by marking the boundaries and the location point in the same manner and by the same means as required by the laws of this state for marking the boundaries of lode claim locations; provided, that where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions, and, except the marking of the location point as hereinbefore prescribed, no other markings than those of said survey shall be required. As amended, Stats. 1899, p. 94; Comp. Laws 1900, § 220. See generally last paragraph of note to § 18, pp. 1312–13, *post.*

For discovery work on placers see Nevada note, § 5, p. 1295, *ante.*

Utah.— Note to § 3, p. 1289, *ante.*

Washington.— The discoverer of placers or of other forms of deposit subject to location and appropriation under the law applicable to placers shall locate his claim in the following manner:

First. He must immediately post in a conspicuous place at the point of discovery thereon a notice or certificate of location thereof, containing, a, the name of the claim; b, the name of the locator or locators; c, the date of discovery and posting of the notice hereinbefore provided for, which shall be construed as the date of location; d, a description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys, otherwise, a description with reference to some natural object or permanent monument as will identify the claim; and where such claim is located by legal subdivisions of the public survey, such location shall, notwithstanding the fact, be marked by the locator upon the ground the same as other locations.

Second. Within thirty (30) days from the date of such discovery he must record such notice or certificate of location in the office of the auditor of the county in which such discovery is made, and so distinctly mark his location on the ground that its boundaries may be readily traced.

Third. Within sixty (60) days from the date of discovery the discoverer shall perform labor upon such location or claim in developing the same to an amount which shall be equivalent in aggregate to at least ten (10) dollars' worth of such labor for each twenty (20) acres or fractional part thereeof contained in such location or claim; provided, however, that nothing in this subdivision shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of developing of petroleum and natural gas and other natural oil products.

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Fourth. Such locator shall, upon the performance of such labor, file with the auditor of the county an affidavit showing such performance, and generally the nature and kind of work so done. Act March 8, 1899, § 10, Laws 1899, p. 69.

Wyoming.— Same as Colorado to "which shall contain," except "ninety" instead of "thirty" days; then —

1. The name of the claim, designating it as a placer claim.
2. The name or names of the locator or locators thereof.
3. The date of location.
4. The number of feet or acres thus claimed.
5. A description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question. Before filing such location certificate, the discoverer shall locate his claim: First, by securely fixing upon such claim a notice in plain painted, printed or written letters, containing the name of the claim, the name of the locator or locators, the date of discovery, and the number of feet or acres claimed. Second, by designating the surface boundaries by substantial posts or stone monuments at each corner of the claim. R. S. 1899, § 2553, as amended Feb. 19, 1901, Laws 1901, p. 104.

See text, §§ 307–315.

3. Legislation Relating to Tunnels.

(Laws of Colorado.)

§ 17. Location and record of tunnel claims.
18. Length of tunnel claims.
19. Tunnel owner may continue through claim of another.
20. Right of owner of intersected vein or claim to inspect tunnel — Purposes for which tunnel may be driven.
21. Ownership of ore in intersected claim at point of intersection — Damages for unlawful removal.
22. Burden of proof as to ownership of vein in tunnels.

§ 17. Location and record of tunnel claims.— (Mills' Ann. Stats., § 3140; Gen. Stats. 1883, p. 720.) If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein.

Nevada.— The locator of a tunnel right or location shall locate his tunnel right or location by posting a notice of location at the face or point of commencement of the tunnel which must contain:

1. The name of the locator or locators.
2. The date of location.
3. The proposed course or direction of the tunnel.

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4. The height and width thereof.

5. The position and character of the boundary monument.

6. A description of the tunnel by such reference to a natural object or permanent monument as will identify the claim or tunnel right. Comp. Laws 1900, § 226; Act March 16, 1897, § 19. See note to next section.

See text, §§ 293–306.

§ 18. Length of tunnel claims.—(Mills' Ann. Stats., § 3141.) Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered; *provided*, they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken on any part thereof where the same may be found vacant; and persons working said tunnel shall have the right of way through all lodes which may lie in its course.

Nevada.— *Boundary lines, how established.*— The boundary lines of the tunnel shall be established by stakes or monuments placed along such lines at an interval of not more than three hundred feet from the face or point of commencement of the tunnel to the terminus of three thousand feet therefrom. The stakes or monuments shall be of the same size and character as those provided for lode or placer claims in this act. Comp. Laws 1900, § 227; Act March 16, 1887, § 20.

Records of tunnel claims — Contents.— The locator of a tunnel right or location shall, within sixty days from the date of location, record his location with the mining district recorder and the county recorder of the county or district in which such location is situated, which must be similar in all respects to the one posted on the location. Any record of a tunnel right or location which shall not contain all the requirements named in this section shall be void. Comp. Laws 1900, § 228; Act March 16, 1897, § 21.

Ownership of blind lodes or veins.— All blind lodes, or veins or lodes not previously known to exist, discovered in a tunnel run for the development of a vein or lode, or for the discovery of mines, and within three thousand feet from the face of such tunnel, shall be located upon the surface and held in like manner as other lode-claims under the provisions of this act. Comp. Laws 1900, § 229; Act March 16, 1897, § 22.

To what the provisions of this act applicable.— The provisions of this act shall be construed as equally applicable to all classes of locations except where the requirements as to any one class are manifestly

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inapplicable to any other class or classes. Comp. Laws 1900, § 230; Act March 16, 1897, § 23.

§ 19. Tunnel owner may continue through claim of another.— (Colorado Tunnel Act of April 17, 1897, § 1.) Any person or company who has, or hereafter may have, a tunnel or cross cut, the mouth of which is located upon his own ground or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of such tunnel, but not to follow or drive upon any vein belonging to the owner of such claim.

Idaho.— Same as Colorado. Civ. Code 1901, sec. 2575.

§ 20. Right of owner of intersected vein or claim to inspect tunnel — Purposes for which tunnel may be driven.— (Tunnel Act of April 17, 1897, § 2.) Such tunnel or cross cut may be driven and worked for the purpose of drainage and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected or his duly authorized agent shall have the right to enter such tunnel upon application to the owner or owners of said tunnel without resorting to any process of law for the purpose of making a survey and inspecting such vein or veins as may be crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulk heading, damming back, or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims without the consent of the owner or owners thereof, it shall work a forfeiture of all rights granted under section 1 of this act.

Idaho.— Same as Colorado, except between "owner or owners" and "of said tunnel" insert "or person in charge." Civ. Code 1901, sec. 2576.

§ 21. Ownership of ore in intersected claim at point of intersection — Damages for unlawful removal.— (Act of April 17, 1897, § 3.) If any ore, the property of the claim

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intersected or crossed, be extracted in driving such tunnel, it shall be the property of the owner of the vein from which it was taken and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel.

Idaho.— Same as Colorado. Civ. Code 1901, sec. 2577.

§ 22. Burden of proof as to ownership of vein in tunnel.— (Act of April 17, 1897, § 4.) In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel, the burden of proving that the vein so discovered was not the property of the adverse claimant in such action shall be on the tunnel owner.

Idaho.— Same as Colorado. Civ. Code 1901, sec. 2578.

4. STATUTORY PROVISIONS RELATING TO LOCATION, RECORDING AND MANNER OF HOLDING MILL SITES.

(Laws of Nevada.)

§ 23. Who may locate.
24. Contents of notice.
25. Locator shall record — Contents of record.
26. When location is void.

§ 23. Who may locate.— (Comp. Laws 1900, § 222; Act March 16, 1897, § 15.) The proprietor of a vein or lode claim or mine, or the owner of a quartz mill or reduction works, may locate five acres of non-mineral land as a mill site.

§ 24. Contents of notice.— (Comp. Laws 1900, § 223; Act March 16, 1897, § 16.) The locator of a mill-site location shall locate his claim by posting a notice of location thereon, which must contain:

1st. The name of the locator or locators;

2d. The name of the vein or lode claim, or mine, of which he is the proprietor, or the name of the quartz mill or reduction works of which he is the owner;

3d. The date of the location;

4th. The number of feet or acres claimed;

5th. A description of the claim by such reference to a natural object or permanent monument as shall identify the claim or mill site. And by marking the boundaries of his

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claim in the same manner as provided in this act for the marking of the boundaries of a placer mining claim, so far as the same may be applicable thereto.

Montana.— See subd. 5, first Montana note, § 3, p. 1286, *ante*.

Utah.— Provisions relate alike to mining claims and mill sites. See subd. 5 of first Utah note to § 3, p. 1290, *ante*, and note to § 7, p. 1300, *ante*.

Location of mill sites discussed in text, §§ 324–26.

§ 25. Locator shall record — Contents of record.— (Comp. Laws 1900, § 224; Act March 16, 1897, § 17.) The locator of a mill-site claim or location shall within thirty days from the date of his location record his location with the mining district recorder and the county recorder of the district or county in which such location is situated, by a location certificate which must be similar in all respects to the one posted on the location.

§ 26. When location is void.— (Comp. Laws 1900, § 225; Act March 16, 1897, § 18.) Any record of a mill-site location which shall not contain the name of the locator or locators, the name of the vein or lode claim or mine of which the locator is the proprietor, or the name of the quartz mill or reduction works of which the locator is the owner, the number of feet or acres claimed, and such description as shall identify the claim with reasonable certainty, shall be void.

For similar provisions as to lode claims, see *ante*, § 4, p. 1293.

5. Providing for the Location of Lands Containing Salt.

(Laws of Nevada.)

§ 27. Location of saline lands.
28. Locator of salt lands must have same surveyed by county surveyor.
29. Locations made prior to passage of act validated — Condition.
30. Acts necessary to save claim from forfeiture.

§ 27. Location of saline lands.— (Act Feb. 24, 1865; Comp. Laws 1900, § 233.) Any person may locate, claim, and hold not exceeding one hundred and sixty acres of the public lands within this state containing salt or saline matter.

This section conflicts with both the late federal statute (Appendix A, IV, c, *ante*, p. 1253) and the general placer-mining law. It is therefore

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void. It will also be noticed that it does not preclude aliens from locating saline lands. See text, § 489.

§ 28. Locator of salt lands must have same surveyed by county surveyor.— (Act Feb. 24, 1865; Comp. Laws 1900, § 234.) It shall be the duty of any person or persons locating salt lands to have the same surveyed by the county surveyor of the county in which said lands are located, within thirty days from the date of location; and the surveyor shall, within thirty days from the completion of said survey, make and deliver to the party employing him to make the survey, a correct description and plat of the lands thus surveyed, and the same shall be recorded in the office of the county recorder of said county within thirty days from the delivery thereof by the surveyor.

See note to last section.

§ 29. Locations made prior to passage of act validated — Condition.— (Act Feb. 24, 1865; Comp. Laws 1900, § 235.) All locations made prior to the passage of this act upon saline lands are hereby ratified and confirmed to the locators thereof, their heirs and assigns; *provided*, the parties now holding and occupying said lands shall, within sixty days from the passage of this act, have the same surveyed and recorded as provided in section 2 of this act.

See note to § 27, *ante*.

§ 30. Acts necessary to save claim from forfeiture.— (Act Feb. 24, 1865; Comp. Laws 1900, § 236.) All persons claiming and holding saline lands under the provisions of this act shall keep and hold actual possession of said lands by occupying the same, and whenever said lands are abandoned for a period longer than sixty days, the same shall be subject to relocation.

6. Provisions Relating to Hydraulic Mining.

(Laws of California.)

§ 31. Where and when hydraulic mining may be carried on.
32. Definition.

The act of March 24, 1893, adds two new sections to the Civil Code of California, as follows:

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§ 31. Where and when hydraulic mining may be carried on.—(1424) The business of hydraulic mining may be carried on within the state of California wherever and whenever the same can be carried on without material injury to navigable streams or lands adjacent thereto.

§ 32. Definition.—(1425) Hydraulic mining, within the meaning of this title, is mining by means of application of water under pressure, through a nozzle, against a natural bank.

7. Statutory Provisions Relating to Minerals Found in State Lands.

(Laws of California.)

§ 33. Surveyor-general not to approve application for certain lands which contain mineral.
34. Mineral in sixteenth and thirty-sixth sections open to exploration.

§ 33. Surveyor-general not to approve application for certain lands which contain mineral.—(Stats. 1897, p. 438, § 2, repealing all prior laws.) When it shall be shown by affidavits or otherwise, to the satisfaction of the surveyor-general that any portion of a sixteenth or thirty-sixth section belonging to the state is valuable for its mineral deposits, the surveyor-general shall not approve any application to purchase the same, nor shall the register of the state land office issue a certificate of purchase therefor until the question of the character of the land has been referred, for determination, to a court of competent jurisdiction, in the manner provided by section thirty-four hundred and fourteen of the Political Code, and adjudged not to be valuable as mining land.

Nevada.—*Prospectors may enter upon mineral lands belonging to the state—Conditions.*—The several grants made by the United States to the state of Nevada reserved the mineral lands. Sales of such lands made by the state were made subject to such reservation. Any citizen of the United States, or a person having declared his intention to become such, may enter upon any mineral lands in this state, notwithstanding the state's selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States; provided, that after a person who has purchased land from the state has

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made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. Mining for gold, silver, copper, lead, cinnabar, and other valuable mineral, is the paramount interest of this state, and is hereby declared to be a public use. Comp. Laws 1900, § 281; Act March 8, 1887, § 1.

See text, §§ 162, 163, where this legislation is criticised.

For provisions relative to leasing state lands containing minerals, see *post*, §§ 76, 77, pp. 1347, 1348.

Property in minerals in state lands, see *post*, this Appendix, VII, 11.

§ 34. Mineral in sixteenth and thirty-sixth sections open to exploration.—(Stats. 1897, p. 438, § 2.) The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States for the sale of mineral lands.

Nevada.—*State disclaims interest in mineral lands.*— Every contract, patent or deed hereafter made by this state or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in such land, and the state, for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the state on account of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the state must obtain such title from the United States under the laws of congress, notwithstanding such selection. Comp. Laws 1900, § 282; Act March 8, 1887, p. 86, § 2.

See also note, § 33, *ante*.

II.

State Statutory Provisions, Supplemental to the Federal Statutes, Relating to the Working and Operation of Mining Property, Including Annual Labor and Proof Thereof, Drainage of Mines, Mining Partnership and Grub-stake Contracts.

1. Annual Labor and the Manner of Making Proof Thereof.

(Laws of Arizona.)

§ 35. Amount of assessment work — By whom done.
36. Affidavit of assessment work.

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§ 37. Forfeiture of interest of co-owner.
38. Record of forfeiture notice as evidence.
39. Acknowledgment of contribution by delinquent co-owner.
40. Penalty for failure to acknowledge contribution — Affidavits by third persons.

§ 35. Amount of assessment work — By whom done.— (R. S. 1901, § 3239.) The amount of assessment or representation work or improvements to be done or made during each year, after the completion of the location as heretofore provided, and the time for doing the same, shall be as provided by the laws of the United States.

California.— See California note, § 36, p. 1323, *post.*

Colorado.—*Work on placer claims.*— On each placer claim of one hundred and sixty acres or more, heretofore or hereafter located, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made by the first day of August, 1879, and by the first day of August of each year thereafter. On all placer claims containing less than one hundred and sixty acres, the expenditure during each year shall be such proportion of one hundred dollars, as the number of acres bears to one hundred and sixty. On all placer claims containing less than twenty acres, the expenditures during each year shall not be less than twelve dollars; but when two or more claims lie contiguous, and are owned by the same person, the expenditure hereby required for each claim may be made on any one claim; and upon a failure to comply with these conditions, the claim or claims upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location; provided, the aforesaid expenditures may be made in building or repairing ditches to conduct water upon such ground or in making other mining improvements necessary for the working of such claim. . . . (Mills' Ann. Stats., § 3137; Gen. Stats. 1883, p. 719.)

This statute, it will be noticed, provides that in some cases less than one hundred dollars' worth of work per year is sufficient to hold a placer claim from forfeiture. This is contrary to the provision of the United States law (R. S. U. S., § 2324; *ante*, pp. 1239, 1240), and therefore of no effect. See text, § 489, also §§ 475–488.

Nevada.— The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: one hundred dollars annually. In estimating the worth of labor required to be performed upon any mining claim, to hold the same under the laws of the United States, the

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value of a day's labor is hereby fixed at the sum of four dollars; provided, however, that in the sense of this statute eight hours of labor actually performed upon the mining claim shall constitute a day's labor. Comp. Laws 1900, § 216; Act March 16, 1897, § 9.

When mortgagee may do assessment work.— This act shall not be so construed as to interfere or conflict with the lawful mining rules, regulations, or customs in regard to the locating, holding, or forfeiture of claims, but, in all cases of mortgages of mining interests under this act, the mortgagee shall have the right to perform the same acts that the mortgagor might have performed for the purpose of preventing a forfeiture of the same under the said rules, regulations, or customs of mines [miners] and shall be allowed such compensation therefor as shall be deemed just and equitable by the court ordering the sale upon a foreclosure; provided, that such compensation shall, in no case, exceed the amount realized from the claim by a foreclosure and sale. Comp. Laws 1900, § 2716; Act Nov. 5, 1861, § 77.

New Mexico.— Same as Nevada, beginning with "in estimating." except after "United States," and before "the" insert "in the regulation of mines." Comp. Laws 1897, § 2288.

When assessment work may be performed by mortgagee or lien holder. When the owner or owners of any mining claim or claims now located or which may hereafter be located, upon which there shall exist any mortgage, miner's or mechanic's lien, or other incumbrance of any kind which may be hereafter made or incurred, shall refuse, neglect or fail, up to the first day of December of any year to perform thereon the annual labor or make thereon the annual expenditure required by law to be made in order to prevent the same from becoming open, in such case the holder or owner of such mortgage, lien or incumbrance, may, upon the first day of December of such year or any time thereafter, before any such mining claim or claims shall have been relocated, enter with his or their workmen and employees upon the same and perform, or cause to be performed, the one hundred dollars' worth of labor or make the one hundred dollars' worth of improvements upon such claim or claims as by law required to be done or made each year in order to prevent such claim or claims from becoming open to relocation; that such work shall be done and improvements made in a workmanlike manner; that for the purpose of performing or causing to be performed such labor and improvements, the holder or holders of such mortgage, miner's or mechanic's lien, or other incumbrance, shall be considered the agent or the agents of the owner or the owners of such mining claim or claims; that the owner or owners or (of) such mining claim or claims, or any other person or persons, shall not in any manner invent [prevent], obstruct, hinder or delay the performance of any labor or the making of such improvements and may be restrained from so doing by injunction; that upon the completion of the one hundred

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dollars' worth of labor or improvements by the holder or holders of any mortgage, miner's or mechanic's lien or other incumbrance as aforesaid upon any mining claim, as herein provided, all sum or sums of money expended by him or them shall be and become a lien upon the said mining claim or claims and from the date of the completion of the same draw the same rate of interest as the principal sum of such mortgage, miner's or mechanic's lien or other incumbrance, and may be foreclosed according to law. Comp. Laws 1897, § 2304.

Same — Penalty for preventing.— Any person or persons who shall prevent, obstruct, hinder or delay the performance of the labor or the making of the improvements mentioned in the last preceding section of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars or over five hundred dollars, or by imprisonment in the county jail for a period not less than six months, nor more than one year, or by both fine and imprisonment. Comp. Laws 1897, § 2305; Act Feb. 5, 1889, § 8.

North Dakota.—Same as Nevada to "United States," then: "Provided, that the period within which the work required to be done annually on all unpatented claims so located shall commence on the first day of January succeeding the location of such claim." R. S. 1899, § 1438.

South Dakota.— Same as Nevada to "annually," then same as North Dakota beginning with "Provided." Comp. Laws Dak. Ty. 1887, § 2009, as adopted by the state legislature.

Utah.— See Utah note to § 36, p. 1326, *post*.

Washington.— *Miners may make road building applicable as assessment work, when.*— Any mining district shall have the power to make road building to mining claims within such district applicable as assessment work, or improvements upon such claims: Provided, that rules pertaining to such road building shall be made only at a public meeting of the miners of such district regularly called by the mining recorder of such district: Provided further, that such meeting shall be attended by at least twelve (12) property holders of such district, and that no such rule can be made without the assent of the majority of the property holders of such district who are present at such meeting. Such meeting to designate where, when and how such work shall be done, and shall designate some one of their number who shall superintend such road building or construction, and who shall receipt for such labor to the performer thereof, such receipts to be filed with the county auditor of the county in which such work is performed, by the holder or holders of such receipts and shall be received as *prima facie* evidence of annual labor performed as annual assessment work upon such claim or claims as may be designated by an affidavit or oath of labor as provided for in section six (6) of this act: Provided, that nothing in this act can be construed as being mandatory upon any owner or holder of mining property to perform such labor upon any such road. Act March 8, 1899, § 14; Laws 1899, p. 69 *et seq.*

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Wyoming.—*Assessment work on placers.*—For every placer claim, assessment work as hereinafter provided shall be done during each and every calendar year after the first day of January following the date of location. Such assessment work shall consist in manual labor, permanent improvements made on the claim in buildings, roads or ditches made for the benefit of working such claim, or after any manner, so long as the work done accrues to the improvement of the claim, or shows good faith and intention on the part of the owner or owners, and their intentions to hold possession of said claim. R. S. 1899, § 2554.

Amount of assessment work.— On all placer claims heretofore or hereafter located in this state not less than one hundred dollars' worth of assessment work shall be performed during each calendar year from the first day of January after the date of location. Id., § 2555, as amended February 19, 1901, Laws 1901, p. 105.

Work on contiguous claims.—When two or more placer mining claims lie contiguously and are owned by the same person, persons, company or corporation, the yearly expenditure of labor and improvements required on each of said claims may be made upon any one of such contiguous claims if the owner or owners shall thus prefer. R. S. 1899, § 2556.

Effect of failure.— Upon failure of the owners to do or have done the assessment work required within the time above stated, such claim or claims upon which such work has not been completed shall thereafter be open to relocation on or after the first day of January of any year after such labor or improvements should have been done, in the same manner and on the same terms as if no location thereof had ever been made; provided, that the original locators, their heirs, assigns or legal representatives had not resumed work upon such claim or claims after failure, and before any subsequent location has been made. Id., § 2558.

These sections, as also the one of Colorado above copied, copy largely from the federal statutes (§ 2324), and to the extent that they are exact copies they may be of some value. See text, § 114.

§ 36. Affidavit of assessment work.—(R. S. Ariz. 1901, § 3240.) Within three months after the expiration of the period of time fixed for the performance of annual labor or the making of improvements upon any mining claim, the person on whose behalf such work or improvement was made, or some person for him knowing the facts, may make and record in the office of the county recorder of the county wherein such claim is situated, an affidavit, in substance as follows:

(Venue.)

—— ——, being duly sworn, deposes and says that he is a citizen of the United States and more than twenty-one

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years of age, resides at ——, in —— county, Arizona Territory, and is personally acquainted with the mining claim known as —— mining claim, situated in —— mining district, Arizona Territory, the location notice of which is recorded in the office of the county recorder of said county, book —— of records of mines, at page ——. That between the —— day of ——, A. D. ——, and the —— day of ——, A. D. ——, at least —— dollars' worth of work and improvement were done and performed upon said claim, not including the location work of said claim. Such work and improvements were made by and at the expense of ——, owners of said claim, for the purpose of complying with the laws of the United States pertaining to assessments of annual work, and (here name the miners or men who worked upon the claim in doing the work) were the men employed by said owner and who labored upon said claim, did said work and improvements, the same being as follows: (Here describe the work done.)

(Jurat.)

One objection to the foregoing is that it seems to require proof by a citizen only.

California.— Whenever any mine owner, company, or corporation shall have performed the labor and made the improvements required by law for the location and ownership of mining claims or lodes, such owner, company, or corporation shall file or cause to be filed, within thirty days after the time limited for performing such labor or making such improvements, with the county recorder of deeds of the county in which the mine or claim is situated, particularly describing the labor performed and improvements made, and the value thereof, which affidavit shall be *prima facie* evidence of the facts therein stated. Upon the failure of any claimant or mine owner to comply with the conditions of this act in the performance of labor, or making of improvements on any claim, mine or mining ground, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made. But if, previous to relocation, the original locators, their heirs, assigns, or legal representatives, resume work upon such claim, and continue the same with reasonable diligence until the required amount of labor has been performed or improvements made, and the required statement of accounts and affidavits filed with the county recorder, then the claim shall not be subject to relocation because of previous failure to file accounts. Laws 1891, § 1, p. 219.

Colorado.— Within six months after any set time, or annual period allowed for the performance of labor, or making improvements upon any lode claim or placer claim, the person on whose behalf such outlay

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was made, or some person for him, may make and record in the office of the recorder of the county wherein such claim is situate an affidavit, in substance as follows:

(Venue.)

Before me, the subscriber, personally appeared ——, who being first duly sworn, said that at least —— dollars' worth of work or improvements were performed or made upon (here describe claim or part of claim) situate in —— mining district, county of ——, state of Colorado, between the —— day of ——, A. D. 1——, and the —— day of ——, A. D. 1——. Such expenditure was made by or at the expense of ——, owners of said claim, for the purpose of complying with the law and holding said claim.

(Jurat.) (Signature.)

And such affidavit when so recorded shall be *prima facie* evidence of the performance of such labor or the making of such improvements; provided, that all affidavits of labor or improvements upon placer claims heretofore filed and recorded within the period prescribed in this section, or within the period prescribed in section 2410 of the general statutes, which shall contain in substance the requirements of the affidavit prescribed by this section or said section 2410, shall be *prima facie* evidence of the performance of such labor or the making of such improvements; and the original thereof, or a certified copy of the record of the same, shall be received as evidence accordingly by the courts of this state, and this class of evidence shall be receivable where relevant or material, in all cases, whether now pending or hereafter brought. Mills' Ann. Stats., § 3161, as amended 1899, pp. 261, 262.

Idaho.— Same as Colorado to form, except "sixty days" instead of "six months," and words between "record" and "affidavit" omitted. Form same as Colorado, except omit "between the," etc., to "such;" after "holding said claim" add, "and all stakes, monuments or trees marking boundaries of said claim are in proper place and positions." Signature. (Jurat.)

The fee for administering the oath and recording the foregoing affidavit, when taken before the county recorder or deputy mining recorder shall be fifty cents; the fee for recording the same when the oath is taken before any other officer authorized to administer oaths shall be fifty cents. Such affidavit, or a certified copy thereof in case the original is lost, shall be *prima facie* evidence of the performance of such labor. The failure to file such affidavit shall be considered *prima facie* evidence that such labor has not been done. Civ. Code 1901, sec. 2565.

Montana.— The owner of a lode or placer-claim who performs or causes to be performed the annual work or makes the improvements required by the laws of the United States in order to prevent the forfeiture of the claim, may, within twenty days after the annual work, file in the office of the county clerk of the county in which such claim is situated, an affidavit of his own, or an affidavit of the person who performed such work or made the improvements, showing:

1st. The name of the mining claim and where situated.

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2d. The number of days' work done, and the character and value of the improvements placed thereon.

3d. The date of performing such work and of making the improvements.

4th. At whose instance the work was done or the improvements made.

5th. The actual amount paid for work and improvements, by whom paid, when the same was not done by the owner.

Such affidavits, or a certified copy thereof, are *prima facie* evidence of the facts therein stated. Rev. Pol. Code 1895, § 3614.

Nevada.— Within sixty days after the performance of labor or making of improvements required by law to be annually performed or made upon any mining claim, the person in whose behalf such labor was performed, or improvements made, or some one in his behalf, shall make and have recorded by the mining district recorder or the county recorder in books kept for that purpose in the mining district or county in which such mining claim is situate, an affidavit setting forth the amount of money expended, or value of labor or improvements made, or both, the character of expenditures or labor or improvements, a description of the claim or part of the claim affected by such expenditures, or labor or improvements, for what year, and the name of the owner or claimant of said claim at whose expense the same was made or performed. Such affidavit, or a copy thereof, duly certified by the county recorder, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, or both. Comp. Laws 1900, § 217; Act March 16, 1897, § 10.

The following seems to destroy the force of the above:

Certificates need not be sworn to.— Certificates of location and of labor and improvements necessary to hold claims need not be sworn to, and are not required to be in any specified form, nor to state facts in any specified order; but must truly state the required facts. Comp. Laws 1900, § 231; Laws 1899, § 24, p. 95.

New Mexico.— The owner or owners of any unpatented mining claim in this territory, located under the laws of the United States and of this territory, shall within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall, in any contest, suit or proceeding touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law. Comp. Laws 1897, § 2315; Act March 18, 1897, § 7.

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Utah.— *Notice of assessment work being done on one for group.*— Every person or company owning a group of claims and doing the development or assessment work for said group at one point, shall post a notice upon each claim at the discovery monument stating where such work is being done, and also post a notice at the entrance of the workings, where said work is done, stating the names of the claims for which the work is done. Act March 3, 1899, § 5; Laws 1899, p. 27.

Affidavit of work.— Same as Montana, except "recorder" instead of "clerk," "must, within thirty days," instead of "may, within twenty days," and at end of third subdivision add, "and number of cubic feet of earth or rock removed." Id., § 6, p. 27.

Washington.— Same as Arizona to "an affidavit," except "thirty (30) days" instead of "three months," and instead of the form of the affidavit add: "or oath of labor performed on such claim. Such affidavit shall state the exact amount and kind of labor, including the number of feet of shaft, tunnel or open cut made on such claim, or any other kind of improvements allowed by law or by rules of mining districts made thereon." Act March 8, 1899, § 6; Laws 1899, p. 69.

Wyoming.— Upon completion of the required assessment work for any mining claim, the owner or owners, or agent of such owner or owners, shall cause to be made by some person cognizant of the facts, an affidavit setting forth that the required amount of work was done, which affidavit shall, within sixty days after the completion of the work, be filed for record, and shall thereafter be recorded in the office of the county clerk and *ex officio* register of deeds of the county in which the claim is located. R. S. 1899, § 2559, as amended by Laws of 1901, p. 105.

The question of annual labor and the manner of making proof thereof is treated in the text, §§ 475–498, especially § 496.

§ 37. Forfeiture of interest of co-owner.— (R. S. Ariz. 1901, § 3245.) Whenever a co-owner or co-owners shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section twenty-three hundred and twenty-four (2324) of the Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder of the county in which the mining claim is situate within ninety (90) days after giving the notice; or, if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the editor, publisher or

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foreman of such paper, stating the date of the first, last and each insertion of such notice therein, and when and where the newspaper was published during that time and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid within one hundred and eighty days after the first publication thereof.

California.— Upon the failure of any one of the several co-owners to contribute his portion of the expenditures required hereby (see California note to § 36, p. 1328, *ante*), the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and if, at the expiration of ninety days after such notice in writing or publication, such delinquent shall fail or refuse to contribute his portion of the expenditures required by this section, his interest in the claim shall become the property of his co-owners who made the required expenditures. A copy of such notice, together with an affidavit showing personal service or publication, as the case may be, of such notice, when filed or recorded with the recorder of deeds of the county in which such mining claim is situated, shall be evidence of the acquisition of title of such co-owners. Where a person or company has or may run a tunnel or cuts, and in good faith, for the purpose of developing a lode, lodes, or claims owned by said person, or company, or corporation, the money so expended in running said tunnel shall be taken and considered as expended on said lodes or claims; provided further, that said lode, claim, or claims shall be distinctly marked on the surface as provided by law. Act March 31, 1891, § 1; Laws 1891, p. 220.

Colorado.— Same as California to "require expenditures," except between "of the year" and "gives such delinquent" insert, "to wit: The first of August, 1879, for the locations heretofore made, and one year from the date of locations hereafter made;" and between "or" and "by publication" insert, "if he be a non-resident of the state, a notice;" and between "ninety days" and "and if at the expiration" insert, "and mailing him a copy of such newspaper if his address be known." Mills' Ann. Stats., § 3137; Gen. Stats. 1883, p. 719.

Nevada.— Same as Arizona except "after must be recorded," instead of "in the office of the county recorder of the county in which the mining claim is situate," insert "by the mining district recorder or the county recorder, in books kept for that purpose, in the mining district or county in which the mining claim is situate;" and instead of "editor, publisher" insert "printer." Comp. Laws 1900, part of § 218; Act March 16, 1897, part of § 11.

This question is treated in the text, § 520 *et seq.*

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§ 38. Record of forfeiture notice as evidence.— (R. S. Ariz. 1901, § 3246.) The original of such notice and affidavits, or the records thereof, shall be evidence that the delinquent mentioned in section 2324 has failed or refused to contribute his proportion of the expenditure required by that section, and of the services (service) or publication of said notice: *Provided*, the writing or affidavit hereinafter provided for is not of record.

Nevada.—Same as Arizona. Comp. Laws 1900, part of § 218; Act March 16, 1897, part of § 11.

§ 39. Acknowledgment of contribution by delinquent co-owner.— (R. S. 1901, § 3247.) If such delinquent shall, within the ninety days required by section 2324 aforesaid, contribute to his co-owner or co-owners his proportion of such expenditures, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents, by name, has, within the time required by section 2324 of the Revised Statutes of the United States, contributed his share for the year —— upon the —— mine, and further stating therein district, county and territory wherein the same is situate, and the book and page where the location notice is recorded. Such writing shall be recorded in the office of the county recorder of said county.

Nevada.—Same as Arizona. Comp. Laws 1900, part of § 218; Act March 16, 1897, part of § 11.

§ 40. Penalty for failure to acknowledge contribution — Affidavits by third persons. — (R. S. 1901, § 3248.) If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners, so failing as aforesaid, shall be liable to a penalty of one hundred dollars, to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days then the delinquent, with two disinterested persons having personal knowledge of said contribution, may make an affidavit, setting forth in

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what manner, the amount of, to whom and upon what mine such contribution was made. Such affidavit, or a record thereof, in the office of the county recorder of the county in which said mine is situate, shall be *prima facie* evidence of such contribution.

Nevada.—Same as Arizona. Comp. Laws 1900, part of § 218; Act March 16, 1897, part of § 11.

2. PROVISIONS REQUIRING MINE OWNER TO GIVE SECURITY FOR PROTECTION OF THE SURFACE WHERE ESTATES HAVE BEEN SEVERED.

(Laws of Colorado.)

§ 43. Right of surface owner to demand security.
44. Miner not to operate under building of another without giving security.

§ 43. Right of surface owner to demand security.—(Mills' Ann. Stats., § 3159.) When the right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused, may enjoin such miner from working until such security is given. The order for injunction shall fix the amount of the bond.

Idaho.—Same as Colorado, except insert "ground" after "surface," after "refused" insert "or not given," and after "working" and before "until," insert "such ground;" instead of last sentence insert: "The court granting the writ of injunction shall fix the amount and nature of the security." Civ. Code 1901, sec. 2571.

Missouri.—*Indemnity bond required to mine in certain cities, etc.—Violation a misdemeanor—Penalty.*—No person, company or corporation shall hereafter sink a shaft, mine, tunnel, excavate or drift for coal, or take out any coal of any kind within the corporate limits or designated boundaries of any city, town or village in this state containing one thousand inhabitants or more, without having first applied and filed, and have approved, an indemnity bond as hereafter provided for; and any person or persons violating the provisions of this section, and any member or stockholder or officer of any company or corporation who shall violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not less than five hundred dollars, or imprisonment in the county jail for not less than six months, or by both such fine and imprisonment. R. S. 1899, § 8777.

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Notice of intention to mine — Publication required.—Every person, company or corporation desiring to carry on any of the mining operations provided for in the preceding section shall give at least thirty days' notice of such intention by notice printed and published in some newspaper printed in such town, city or village wherein such mining operations are proposed to be carried on, or if no newspaper be printed in such city, town or village, then in some newspaper printed in said county, or if no newspaper be printed in such county, then by written or printed hand-bills posted up in six public places in the city, town or village wherein such mining operations are proposed to be carried on. Such notice shall contain an accurate description of the locality where such mining operations are to be carried on, giving the number of lot and block, and shall also state the nature of such mining operations, and name some day of the term of the next circuit court in said county, thereafter to be holden, when such person, company or corporation will offer for filing and approval the indemnity bond hereinafter provided for. Id., § 8778.

The next three sections provide for hearing, by the circuit court of the county, of the petition of the applicants to mine, pursuant to notice as provided in the last two sections; for testimony before the court upon all matters relating to the application, and for the court to fix the amount of the bond in case he is satisfied that the proposers own the land or mining privileges under the land described in their petition, the bond in no case to be less than one thousand dollars. Upon the giving of the bond the court shall enter an order permitting such mining operations. The conditions of the bond, which is to be signed by the applicant and at least two sureties, are also provided for. Id., §§ 8779–8781.

North Dakota.—Same as Colorado, except "injunctional order" instead of "order for injunction." R. S. 1899, § 1436.

South Dakota.—Same as Colorado, except insert "ground" after "surface," and after "refused" and before "may" insert "or not given." Comp. Laws Dak. Ter. 1887, § 2007.

Wyoming.—Where a mining right exists in any case and is separate from the ownership or right of occupancy to the surface, such owner or rightful occupant of such surface may demand satisfactory security from the miner or miners, and if such security is refused, such owner or occupant of the surface may enjoin the miner or miners from working such mine until such security is given. Last sentence same as Colorado. R. S. 1899, § 2537.

This class of legislation is criticised in the text, § 1018.

§ 44. Miner not to operate under building of another without giving security.—(Mills' Ann. Stats., § 3139.) No person shall have the right to mine under any building or

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other improvements unless he shall first secure the parties owning the same against all damages, except by priority of right.

Missouri.— *Written permission of property owner — Violation, misdemeanor, penalty, fines, etc.*— Anyperson or persons who shall in person or by their servant, agent or employee, dig, excavate, mine, tunnel or drift upon or under the lands or lots of another, within the incorporate limits or designated boundaries of any city, town or village in this state, and every officer and stockholder that shall either authorize or permit its servants, agents or employees to dig, excavate, mine, tunnel or drift upon or under the lands or lots of another within such limits or boundaries of such city, town or village, without the written permission of the owner or owners of such land or lots, shall be deemed guilty of a misdemeanor, and shall be punished, on conviction, for every such offense, by fine of not less than five hundred dollars, with costs, which fine and costs, if not paid within five days after conviction, may be sued for and recovered against the parties and sureties on the mining bond of such persons, company or corporation liable for such acts, in a suit upon such bond, in the name of the state of Missouri, to the use of the county in which such offense is committed; such fine, when collected, shall be paid, one-half to the owner of the property injured by such offense and the other half into the school fund of such county; but no such conviction shall be a bar to the owner of such property prosecuting a suit on said bond to his own use for the damages sustained by any such offense. Every such conviction, whether appealed from or not, shall work a forfeiture of the authority to mine granted such person, company or corporation liable, and they shall not proceed further with the operations, except by making application and giving a new bond as in the first instance. R. S. 1899, § 8782.

8. Provisions Relating to Drainage.

(Laws of Arizona.)

§ 45. Owners to provide drainage, when.
46. Owners failing to provide drainage may be sued.
47. Incorporation for drainage.
48. One owner may drain and recover cost — Iowa lead mine statute.
49. Court may order inspection — Requisites of order — Rights of inspectors — Court may order removal of obstructions.
50. Act applies when.

§ 45. Owners to provide drainage, when.— (R. S. Ariz. 1901, § 3252.) Whenever adjacent or contiguous mines, occupied and worked upon the same or upon separate lodes have a common ingress of water or by reason of subterranean

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communication of water have a common drainage, it shall be the duty of the owners, lessees or occupants of said mine so related, to provide for their proportionate share of such drainage, or to prevent the water in such mine from flowing in or upon neighboring mines, thereby imposing upon them an unjust burden.

Colorado.— Same as Arizona to "drainage," remainder omitted. Mills' Ann. Stats., § 3172.

Wyoming.— See note to *post*, § 50, p. 1334.

§ 46. Owners failing to provide drainage may be sued.— (R. S. Ariz. 1901, § 3253.) If any owners, lessees or occupants of any such mine shall fail or neglect to provide for the drainage thereof, and by reason of such failure or neglect, the owners, lessees or occupants of any adjacent or contiguous mine are compelled to pump or drain or otherwise provide for the water flowing in from such first mentioned mine, then, and in such event the owners, lessees or occupants of the mine so in default, shall pay, respectively, to those performing the work of drainage, their proportion of the actual and necessary cost and expense of pumping, draining or otherwise providing for said water, and if they fail or refuse to make such payment, the same may be recovered by an action in any court of competent jurisdiction.

Colorado.— Same as Arizona. Mills' Ann. Stats., § 3173.

Wyoming.— See note to *post*, § 50, p. 1334.

§ 47. Incorporation for drainage.— (R. S. Ariz. 1901, § 3254.) It shall be lawful for all mining corporations or companies and all individuals engaged in mining having thus a common interest in draining such mines, to unite for the purpose of effecting the same under such common name and upon such terms and conditions as may be agreed upon; and every such association having filed a certificate of incorporation, as provided by law, shall be deemed a corporation, with all the rights, incidents and liabilities of a body corporate so far as the same may be applicable.

Colorado.— Same as Arizona. Mills' Ann. Stats., § 3174.

Wyoming.— See note to *post*, § 50, p. 1334.

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§ 48. One owner may drain and recover cost — Iowa lead mines statute.— (R. S. Ariz. 1901, § 3255.) Failing mutually to agree as indicated in the preceding section for drainage jointly, one or more of said parties may undertake the work of drainage after giving reasonable notice to the other parties interested as aforesaid, and should the remaining parties then fail, neglect or refuse to unite in equitable arrangements for doing or sharing the expense thereof, they shall be subject to an action therefor as already specified, to be enforced in any court of competent jurisdiction.

Colorado.— Same as Arizona. Mills' Ann. Stats., § 8175.

Iowa.— *Compensation for draining lead mines.*— Any person or corporation who by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead-bearing mineral lands or lead mines of water, thereby enabling the miners and the owners of mineral interest in said lands to make them productive and available for mining purposes, shall receive one-tenth of all the lead mineral taken from said lands as compensation for said drainage. Comp. Laws 1873, § 1229, Ann. Code 1897, § 1968.

Wyoming.— See note to *post*, § 50, p. 1334.

§ 49. Court may order inspection—Requisites of order—Rights of inspectors — Court may order removal of obstructions.— (R. S. Ariz. 1901, § 3256.) When an action is commenced, as provided herein, to recover the costs and expenses for draining a lode or mine, it shall be lawful for the plaintiff to apply to the court, or to the judge thereof in vacation, for an order to inspect and examine the lodes or mines claimed to have been drained by the plaintiff, and upon affidavit that such inspection or examination is necessary for a proper preparation of the case for trial, the court or judge shall grant an order for the underground inspection and examination of the lode or mine described in the petition. Such order shall designate the number of persons, not exceeding three, besides the plaintiff or his representative, who may examine and inspect such lode and mines, and take measurements for the purpose of showing the amount of water taken from the lode or mine, or the number

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of fathoms of ground mined and worked out of the lode or mines claimed to have been drained, the cost of such examination and inspection to be borne by the party applying therefor. The court or judge shall have power to cause the removal of any rock, debris or any other obstacle in any lode or vein when such removal is shown to be necessary to a just determination of the question involved: *Provided*, that no such order for inspection and examination shall be made except upon notice of at least three days, nor unless it appears that the plaintiff has been refused the privilege of making the examination by the defendant, his or their agent.

Colorado.— Same as Arizona. Mills' Ann. Stats., § 3176.

Wyoming.— See note to *post*, § 50.

§ 50. Act applies when.— (R. S. Ariz. 1901, § 3257.) The provisions hereof shall not apply to unopened or undeveloped mines but shall apply to all opened and developed mines which derive a benefit from being drained.

Colorado.— Same as Arizona. Mills' Ann. Stats., § 3179.

Wyoming.— *Disposition of water.*— Whenever any person, persons or corporation, shall be engaged in mining or milling in this state, and in the prosecution of such business shall hoist or bring water from mines or natural water courses, such person, persons or corporation shall have the right to use such water in such manner, and direct it into such natural course or gulch as their business interests may require; provided, that such diversion does not infringe on vested rights. The provisions of this section shall not be construed to apply to new or undeveloped mines, but to those only which shall have been opened and require drainage or other direction of water. R. S. 1899, § 2535.

4. Provisions Relating to Mining Partnership.

(Laws of California.)

§ 51. Definition.
52. No agreement necessary to constitute.
53. Division of profits.
54. Lien against partnership property for certain purposes.
55. What is partnership property.
56. Conveyance of interest does not dissolve.
57. Purchaser takes subject to certain liens.
58. Same.
59. One member cannot bind others.
60. Decision of majority in interest controls.

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§ 51. Definition.— (Civil Code, § 2511.) A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting mineral therefrom, actually engage in working the same.

Idaho.— Same. Civ. Code, 1901, sec. 2774.
Montana.— Same. Rev. Civ. Code, 1895, § 3350.
The question of mining partnerships generally, is discussed in the text. § 1500 *et seq.*

§ 52. No agreement necessary to constitute.— (Civil Code, § 2512.) An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interest in the mine, and working the same for the purpose of extracting mineral therefrom.

Idaho.— Same. Civ. Code 1901, sec. 2775.
Montana.— Same. Rev. Pol. Code 1895, § 3351.
Text, § 1500 *et seq.*

§ 53. Division of profits.— (Civ. Code, § 2513.) A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or the whole number of shares.

Idaho.— Same. Civ. Code 1901, sec. 2776.
Montana.— Same. Rev. Pol. Code 1895, § 3352.
Text, § 1500 *et seq.*

§ 54. Lien against partnership property for certain purposes.— (Civ. Code, § 2514.) Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors thereof, and for money advanced by him for its use. This lien exists notwithstanding there is an agreement among the partners that it must not.

Idaho.— Same, except in place of "This lien exists" insert "A lien exists in favor of the creditors." Civ. Code 1901, sec. 2777.
Montana.— Same as California. Rev. Pol. Code 1895, § 3353.

§ 55. What is partnership property.— (Civil Code, § 2515.) The mining ground owned and worked by part-

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ners in mining, whether purchased with partnership funds or not, is partnership property.

Idaho.— Same. Civ. Code 1901, sec. 2778.
Montana.— Same. Rev. Pol. Code 1895, § 3354.

§ 56. Conveyance of interest does not dissolve.— (Civil Code, § 2516.) One of the partners in a mining partnership may convey his interest in a mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

Idaho.— Same. Civ. Code 1901, sec. 2779.
Montana.— Same. Rev. Pol. Code, § 3355.

§ 57. Purchaser takes subject to certain liens.— (Civil Code, § 2517.) The purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership, unless he purchased in good faith, for a valuable consideration, without notice of such lien.

Idaho.— Same. Civ. Code 1901, sec. 2780.
Montana.— Same. Rev. Pol. Code, § 3356.

§ 58. Same.— (Civil Code, § 2518.) A purchaser of the interest of a partner in a mine when the partnership is engaged in working it, takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

Idaho.— Same. Civ. Code 1901, sec. 2781.
Montana.— Same. Rev. Pol. Code, § 3357.

§ 59. One member cannot bind others. — (Civil Code, § 2519.) No member of a mining partnership, or other agent or manager thereof, can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof.

Idaho.— Same. Civ. Code 1901, sec. 2782.
Montana.— Same. Rev. Pol. Code, § 3358.

§ 60. Decision of majority in interest controls.—(Civil Code, § 2520.) The decision of the members owning a ma-

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jority of the shares or interest in a mining partnership, binds it in the conduct of its business.

Idaho.— Same. Civ. Code 1901, sec. 2783.
Montana.— Same. Rev. Pol. Code, § 3359.
See text, § 1526.

5. PROVISIONS RELATING TO PROSPECTING OR GRUB-STAKE CONTRACTS.

(Laws of Oregon.)

§ 61. Grub-stake contracts must be recorded.

§ 61. Grub-stake contracts must be recorded.— (Sess. Laws 1898, p. 16.) That all contracts of mining copartnership commonly known as grub staking, shall be in writing and filed for record with the recorder of conveyances of the county where the locations thereunder are made. Such contracts must contain, first, the names of the parties thereto, and second, the duration thereof. Otherwise such contracts shall be null and void.

Idaho.— Written contracts relating to prospecting or mining, or to the formation of copartnership for that purpose, when signed by the parties thereto and indorsed by at least one witness, may be recorded in the office of the county recorder of the county wherein it is proposed to prosecute the business of said copartnership, or where the property affected by such contract is situated.

Such record shall be constructive notice to all persons of the matters contained in such contract or copartnership agreement. Civ. Code 1901, sec. 2784.

See text, § 1590 *et seq.*

III.

PROVISIONS DEFINING THE NATURE OF ESTATES IN MINES AND DIRECTING THE MANNER IN WHICH THE SAME MAY BE TRANSFERRED OR ABANDONED.

(Laws of Oregon.)

§ 62. Mining claims classed as real estate.
63. Ditches and flumes connected with mining claims classed as real estate — Abandonment.
64. Transfers of mining claims — Description — Who may transfer.

§ 62. Mining claims classed as real estate.— (Laws 1898, p. 16, § 5.) All mining claims, whether quartz or placer, shall be real estate, and the owner of the possessory

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right thereto shall have a legal estate therein within the meaning of section 316 of Hill's Code. As amended, Laws 1899, p. 62.

Colorado.— The terms "land" and "real estate," as used in this chapter, shall be construed as co-extensive in mining with the terms "lands, tenements, and hereditaments," and as embracing all mining claims and other claims, and chattels real. The term "deed" includes mortgages, leases, releases and every conveyance and incumbrance under seal.

§ 63. Ditches and flumes connected with mining claims classed as real estate — Abandonment.— (Laws 1898, p. 16, § 9.) Ditches and mining flumes, permanently fixed to the soil, are hereby declared to be real estate: *provided*, that whenever any person, company or corporation, being the owner of any such ditch, flume or water right, for a period of five years, and every person, company or corporation who shall remove from this state with the intent to change his or its residence, and shall remain absent one year without exercising ownership over such ditch, flume or water right, shall be deemed to have lost all title, claim and interest therein.

New Mexico.— *How mining claims may be abandoned.*— In addition to the provision of law now in force in respect to the abandonment of mining claims, they may be abandoned in the following manner: The owner or owners of any mining claim, wishing to abandon the same, may sign and acknowledge in the same manner provided by law for the acknowledgment of deeds, and file for record in the office of the county recorder, a certificate describing the same, stating when and by whom located, the name of the claim, the book and page where the notice of location of such claim is recorded; that he or they give up and abandon such claim, and that the same is open and subject to relocation. Upon the filing of such certificate, the mining claim therein described shall be considered abandoned and open to relocation as if the same had never been located, and the owner or owners thereof forever estopped from claiming any right or interest therein under the location mentioned in said certificate: Provided, that this provision for abandonment shall not apply to any claim or location upon which any mortgage, lien or other incumbrance exists. Comp. Laws 1897, § 2303.

For statutory provisions on location of abandoned claims see *ante*, § 10, p. 1303. See also text, § 570 *et seq.*

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§ 64. Transfers of mining claims — Description — Who may transfer.— (Laws 1898, p. 16, § 7.) All conveyances of mining claims, or of interests therein, either quartz or placer, shall be subject to the provisions governing transfers and mortgages of other realty as to execution and recordation, foreclosure, execution sale, and redemption thereunder, but such redemption by the judgment debtor must take place within sixty days from the date of confirmation, or such right is lost.

Arizona.—*Description.*— In all actions, judgments, grants or conveyances it shall be a sufficient description of a mining claim if it can be intelligently learned therefrom the name of the claim, the district, county and territory where it is situate, and the book and page where the location notice thereof is recorded. R. S. 1901, § 3249.

Illinois.— Any mining right, or the right to dig for or obtain iron, lead, copper, coal or other mineral from land, may be conveyed by deed or lease, which may be acknowledged and recorded in the same manner and with like effect as deeds and leases of real estate. Act March 24, 1874, § 6; Starr & Curtis' Ann. Stats. 1885, p. 1627.

Nevada.— Conveyance of mining claims shall hereafter require the same formalities and be subject to the same rules of construction as the transfers and conveyances of other real estate. Act December 12, 1862, § 1; Comp. Laws 1900, § 2720.

Previous conveyances validated.— Conveyances of mining claims previous to the passage of the foregoing are validated. Id., § 2721.

Conveyances by minors.— All minors in the state over the age of eighteen years are hereby authorized and empowered to sell and convey by deed such interests as they may have acquired, or may hereafter acquire, in mining claims or mining locations within this state, by virtue of locating the same, or being located therein, and such deed shall, if otherwise sufficient in law, be held valid and sufficient to convey such interest fully and completely, and without the right of subsequent revocation, notwithstanding the minority of the grantor, subject, however, to the same provisions and limitations contained in the first section of this act. Act February 27, 1869, § 2; Comp. Laws 1900, § 2724.

Section 1 of the above act (2723) validates conveyances by minors over eighteen years of age prior to the passage of the act.

Mining conveyances discussed in the text, § 1090 *et seq.*

Locations by minors, see text, § 275.

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IV.

State Statutory Provisions, Annotated, Relating to Mining Leases of Private and Public Lands.

1. In Private Lands.

(Laws of Missouri.)

§ 68. Rights of miners and owners of mineral lands — Condition of permits.
69. Persons other than servants of owner operating mines with owner's consent have right to continue — Forfeiture — How accomplished.
70. Miner has ores, except royalty, until tender of payment by owner.
71. Notice to owner or lessee.
72. Owner or lessee shall drain mine, etc.
73. Scrapping for ore prohibited, etc. — Penalty.

§ 68. Rights of miners and owners of mineral lands — Condition of permits.— (R. S. 1899, § 8766.) When any person owning real estate in this state, or any person having a leasehold interest in such real estate for mining purposes by lease from the owner thereof, duly acknowledged and recorded in the county wherein the land lies, shall permit any person or persons other than their servants, agents or employees, to enter and dig or mine thereon for lead ore or other minerals, with the consent of such owner or owners or lessee, he or they shall keep a printed statement of the terms, conditions and requirements upon which such lands may be mined or prospected, and the time during which the right to mine or prospect thereunder shall continue, posted or hung up in a conspicuous place, in plain, legible characters, in the principal office or place of business of such person or company in the county in which said lands are situated, or in a county contiguous thereto, and shall deliver to any person mining or prospecting, or about to mine or prospect on said lands, and requesting it, a printed copy of such statement; all persons digging or mining on said lands, after the posting up of such statement, shall be deemed to have agreed to and accepted the terms thereof, and shall, together with such owner or lessee, be

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bound thereby, and upon failure or refusal to comply with the terms, conditions and requirements of such statement, he or they shall forfeit all right thereunder, and the owner or lessee, as aforesaid, of such lands, may re-enter thereon and take possession of the same, nor shall the receipt of any ore or mineral by any such owner or lessee, after any such forfeiture has been incurred, be deemed or taken as a waiver of such forfeiture.

See New Mexico and Wisconsin notes to § 69, *post.*

§ 69. Persons other than servants of owner operating mines with owner's consent have right to continue — Forfeiture — How accomplished.— (R. S. 1899, § 8767.) Whenever any such owner or lessee of real estate shall permit any person or persons, other than their servants, agents or employees, to enter and dig for lead ore or other minerals on such real estate, with his consent, but without such owner or lessee complying with the provisions of section 8766, and such person or persons having so entered upon said lands by the permission or consent of such owner or lessee as aforesaid, and having in good faith dug or opened any shaft, mine, quarry, prospect or deposit of mineral, or extended or opened from any shaft or mine any room, drift, entry or other excavation, he or they shall have the exclusive right as against such owner or lessee giving such permit or consent, and against any person claiming by, through or under such owner or lessee, to continue to work, mine and dig such shaft, mine, prospect or deposit of mineral so dug or opened by him or them as aforesaid, in said real estate, with a right of way over such lands for the purpose of such mining, for the term of three years from the date of the giving of such consent or permit: *Provided, however*, that if such person or persons, in each case so mining as aforesaid, shall fail or neglect to work or cause to be worked such shaft, mine, quarry, prospect or deposit of mineral for ten days, not including Sundays, in any one calendar month, after commencing said work, he or they shall forfeit all rights to work, mine or hold the same as against such owner or lessee, unless such

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failure or neglect was caused by unavoidable circumstances, or by the act of such owner or lessee or his agent, or unless such owner or lessee consent thereto: *Provided, further*, that such person or persons, so mining as aforesaid, shall pay to the owner or lessee of said lands giving such permit or consent the royalty for mining thereon, at least once every month, if demanded by such owner or lessee, by delivering the same to him at or near the mouth or opening of such mine, shaft or quarry, or at the nearest usual place of business of such owner or lessee, or at any other place that may be agreed upon by such miner and owner or lessee; which said royalty, unless otherwise agreed upon by them, shall be the same and kind in proportionate amount as is paid by others mining the same kind of ore or mineral on said lands to such owner or lessee, or the value of such royalty in cash; and if there be no other person mining on said lands on terms prescribed by such owner or lessee, then he or they shall pay to such owner or lessee the same rate and kind of royalty on lead ore or minerals taken out by him or them as is paid by miners on lands nearest thereto belonging to other persons, or the value of such royalty in cash. Such owner or lessee of any real estate shall have a lien on all minerals taken or dug therefrom for the royalty due thereon until the same is paid; and if any such person or persons so mining shall refuse or fail to pay such royalty to such owner or lessee, or his agent, when demanded as aforesaid, he or they shall thereby forfeit the right to work such mine, shaft, quarry, prospect or deposit of mineral, and the said owner or lessee may thereupon enter and take possession of the same.

New Mexico.—*When lease shall be terminated.*— Hereafter any lease upon any mine, or portion of a mine, not given in writing, for a specified time, shall not be terminated until after notice of the date of such termination, given by the lessor or lessee, not less than thirty days prior to such date of termination. Comp. Laws 1897, § 2358.

When lessor is liable in damages to lessee.— The lessor and the mine upon which any lease is terminated without thirty days' notice, as provided in section two thousand three hundred and fifty-eight, shall be

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liable to the lessee for all damages resulting from such termination: Provided, that nothing in this act shall prevent the forfeiture and termination of any such lease without such notice, when the lessee is working the leased ground in such manner as to damage the property. Id., § 2359.

Mining leases generally, see text, § 1141 *et seq.*

Mining licenses, text, § 1390.

Wisconsin.— *Rules governing mining rights.*— Where there is no contract between the parties, or terms established by the landlord to the contrary, the following rules and regulations shall be applied to mining contracts and leases for the digging of ores and minerals, viz:

1. No license or lease, verbal or written, made to a miner shall be revocable by the maker thereof after a valuable discovery or prospect has been struck, unless the miner shall forfeit his right by negligence, such as establishes a forfeiture by mining usages.

2. The discovery of a crevice or range containing ores or minerals shall entitle the discoverer to the ores or minerals appertaining thereto, subject to the rent due his landlord, before as well as after the ores or minerals were separated from the freehold; but such miner shall not be entitled to recover any ores or minerals, or the value thereof, from the person digging on his range in good faith and known to be mining thereon, until he shall have given notice of his claim; and he shall be entitled to the ores or minerals dug after such notice.

3. Usages and customs among miners may be proved in explanation of mining contracts to the same extent as usage may be proved in other branches of business. R. S. 1898, § 1647.

Lessee's fraud — Failure to work mine.— Any miner who shall conceal or dispose of any ores or minerals on mines or diggings for the purpose of defrauding his lessor of his rent, or who shall neglect to pay royalty on ores or minerals raised by him for three days after the notice thereof and claim of such rent, shall forfeit his rights to his mines, diggings or range; and his landlord after such concealment, or after three days have expired from the time of demanding rent, may proceed against him to recover possession of mines or diggings, before a justice of the peace as in the case of a tenant holding over after the termination of his lease as provided by these statutes; and in case a miner shall neglect to work his mine or diggings according to the usages of the miners, without reasonable excuse, he shall likewise forfeit his mines or diggings, and his landlord may proceed against him to recover possession of the same. R. S. 1898, § 1649.

§ 70. Miner has ores, except royalty, until tender of payment by owner.— (R. S. 1899, § 8768.) Any such persons who, by the permission or consent of the owner or lessee of any real estate, and having the right to mine

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thereon, and having entered and dug or mined thereon any lead ore or other mineral, shall have the right to the exclusive possession of such ore or mineral, except the royalty thereon, which shall be paid as hereinbefore provided, until he or they shall be paid or tendered by such owner or lessee of such real estate the then highest market price in cash paid by such owner or lessee for the same kind of ore or mineral dug or mined on said lands, and if no other such ores or minerals are at the time being dug or mined on said lands and sold to such owner or lessee, then the highest price paid for such ore or mineral dug on lands nearest thereto shall be paid or tendered by such owner or lessee in such case, and upon such payment or tender, the absolute right to the possession of such lead ore or other mineral so dug out and mined under the provisions of the next preceding section, and for which such payment or tender shall have been made, shall vest in such owner or lessee.

See Wisconsin note, § 69, *ante;* New Mexico note, id.

§ 71. **Notice to owner or lessee.**— (R. S. 1899, § 8769.) If any person or persons having dug or mined lead ore or other mineral, and having the same in his or their possession, and having offered to deliver such mineral according to contract, or paid or tendered the royalty, if any, due thereon, or the value of such royalty in cash, to such owner or lessee of said real estate, or to his agent, shall serve or cause to be served a notice in writing upon such owner or lessee or his agent, by delivering to him a copy thereof, or by leaving a copy thereof at the usual place of abode of such owner, lessee or agent, with some member of the family over the age of fifteen years, stating in such notice the amount of lead ore or other mineral he or they have ready for delivery, and requiring such owner, lessee or agent, to receive and pay for the same, the said owner or lessee shall, within five days after the service of such notice, receive and pay for such lead ore or other mineral which the said person or persons digging or mining the same may deliver to him, not exceeding the amount named in the notice; and in such case

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if such owner or lessee fail or refuse within the time aforesaid to pay for such lead ore or mineral delivered or offered to be delivered to him as aforesaid at the said price, then in that event the said person or persons who dug and mined the same shall thereupon acquire an absolute title to such lead ore or mineral, and may thereupon dispose of the same to any person or in any manner he or they may choose.

§ 72. Owner or lessee shall drain mine, etc.— (R. S. 1899, § 8775.) When any person owning any real estate in this state, or any person or persons having a leasehold therein for the purpose of mining for lead or zinc ore thereon by lease from such owner, shall open such real estate for mining purposes, and shall permit any person or persons other than their agents, servants or employees to enter and dig or mine for lead or zinc ores thereon, and shall make any rule or contract whereby any pump-rent or royalty is reserved unto said land-owner or lessee for the drainage of the land so mined, and shall fail or refuse to drain any such land or mining lot to the full depth to which the laborers are working or seeking to work, but prevented by water, then and in such event, such owner or lessee thereof shall not be entitled to collect or retain any pump-rent or royalty so reserved as aforesaid for any ores taken from said mine or lot, below the depth of the water level in said mine or lot, so long as said owner or lessee shall fail or refuse to drain said mine, nor shall such land-owner or lessee be entitled to forfeit any right to hold and mine said lot so long as work is prevented therein by reason of water accumulated therein, on account of any failure to drain said mine by such land-owner or lessee, any rule, contract or agreement to the contrary notwithstanding.

For drainage statutes generally, see *ante*, §§ 47–50, this Appendix.

§ 73. Scrapping for ore prohibited, etc.— Penalty.— (R. S. 1899, § 8776.) It shall be unlawful for any person to take or in any manner receive or obtain any lead or zinc ore by means of gleaning or culling, commonly called

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"scrapping," without first having obtained the written consent of the person having possession and control of the mine from which said ores are to be taken; and it shall be unlawful for any person or company of persons to purchase, or in any manner to receive any lead or zinc ore which may have been stolen or taken by means of culling or gleaning, commonly called "scrapping," without such written consent as aforesaid, knowing that said ores have been so stolen or taken without written consent, as herein provided. Any person violating the provisions of this section, on conviction, shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail not more than one year, or by both such fine and imprisonment, and the inadequacy of the price paid for such ore, the quantity purchased or received, and the fact that the person from whom such ores may have been purchased or received is not regularly engaged in running or operating mines for such ores, may be shown, and shall be received as *prima facie* evidence of guilty knowledge of the person so purchasing or receiving such ores: *Provided, however*, that nothing herein contained shall be so construed as to prevent any person from gleaning, culling or scrapping for ores about his own mine, nor to prevent any person from purchasing such ores when the same have been obtained in such manner by the owner or operator of any such mine.

Nevada.— *Damages for unskilful mining.*— Any person or persons, company or corporation, being the owner or owners of, or in possession under any lease or contract for the working of any mine or mines within the state of Nevada, shall have the right to institute and maintain an action, as provided by law, for the recovery of any damages that may accrue by reason of the manner in which any mine or mines have been or are being worked and managed by any person or persons, company or corporation, who may be the owner or owners, or in possession of and working such mine or mines under a lease or contract, and to prevent the continuance of working and managing such mine or mines in such manner as to hinder, injure, or by reason of tunnels, shafts, drifts or excavations, the mode of using, or the character and size of the timbers used, or in any wise endangering the safety of any mine or mines adjacent or adjoining thereto. Any such owner of, or in the possession of

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any mine or mining claim, who shall enter upon or into, in any manner, any mine or mining claim, the property of another, and mine, extract, excavate or carry away any valuable mineral therefrom, shall be liable to the owner or owners of any such mine or mines trespassed upon in twice the amount of the gross value of all such mineral mined, extracted, excavated or carried away, to be ascertained by an average assay of the excavated material or the ledge from which it is taken. Act approved December 17, 1862; Comp. Laws 1900, § 250.

Judgment for damages lien.— Any judgment obtained for damages under the provisions of this act shall become a lien upon all the property of the judgment debtor or debtors, not exempt from execution, in the territory of Nevada, owned by him, her, or them, or which may afterwards be acquired, as is now provided for by law, which lien shall continue two years, unless the judgment is sooner satisfied. Id., § 251.

NOTE.— The foregoing sections from the Nevada statutes, especially the first section, are incorporated here, not because the author claims to understand just what the legislators meant, but because this seems the most appropriate place for them, if they are entitled to any place at all in this Appendix.

2. IN STATE LANDS.

(Laws of Utah.)

§ 76. State mineral lands may be leased.
77. Rules regarding leasing.

§ 76. State mineral lands may be leased.— (R. S. 1898, § 2370.) Any state lands upon which stone, coal, coal oil, gas, or any mineral may be found, whether such land has theretofore been leased for a term of years or not, may be leased for the purpose of obtaining therefrom such stone, coal, coal oil, gas, or any mineral, for such length of time and conditioned upon the payment to the state board of land commissioners of such royalty upon the product as the state board of land commissioners may determine.

Colorado.— The state board of land commissioners may lease any portion of the lands of the state. . . . If stone, coal, coal oil, gas or other mineral not herein mentioned, be found upon the said land, such land — then same as Utah, beginning with "may be leased." Mills' Ann. Stats. 1888, § 3634.

Michigan.— That the commissioner of the state land office be and he is hereby authorized to lease, as hereinafter provided, any of the mineral land reserved from sale by the provisions of section number three of act number seventy-eight, approved April twenty-eight (twenty-five) 1846. Comp. Laws 1897, § 1411. See *post*, this Appendix, § 80, note.

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Washington.— The commissioner of public lands of the state of Washington is hereby authorized to execute leases and contracts for the mining of gold, silver, copper, lead, cinnabar or other valuable minerals except coal, from any land now belonging to the state or from any lands to which the state may hereafter acquire title, subject to the conditions hereinafter provided. Laws 1897, ch. 102, § 1.

Any citizen of the United States finding precious minerals upon any lands belonging to the state of Washington may apply to the commissioner of public lands for a lease of any amount of land not to exceed the amount of land allowed by the United States mining laws for locating and recording mining claims, and same dimensions. Id., § 2.

The manner of locating a mineral claim upon state land shall be similar to the state law regulating locating mineral claims on government land: Provided, that any citizens that have found minerals on state lands previous to the passage of this act and have posted up notice setting forth the dimensions according to the mining law of the United States and the state of Washington, shall have prior right to lease the same, and shall have ninety (90) days after the passage of this act to make application to the commissioner of public lands for a lease. Id., § 8.

§ 77. Rules regarding leasing.— (R. S. 1898, § 2371.) The state board of land commissioners is hereby authorized to make all necessary rules and regulations to carry the foregoing section into effect.

Colorado.— For provisions upon this subject, including the terms upon which lessee may obtain a renewal of his lease, see Mills' Ann. Stats., §§ 3635, 3636.

Michigan.— Comp. Laws 1897, §§ 1412–1421.

Washington.— Act March 17, 1897, Laws 1897, ch. 102, and amendment thereto, Laws 1899, p. 327.

See Washington note, § 76, *ante*, this page.

V.

THE STATUTES OF NEW YORK AND MICHIGAN.

(N. Y. Laws 1894, ch. 317, as amended; 1901, ch. 416, §§ 80–85; and R. S. 1889, p. 618, § 5.)

§ 80. State mines — Sovereign right of people in gold and silver.
81. Working of mines in state lands — Report to secretary of state.
82. Private property in certain mines.
83. Notice of discovery — Bounty to discoverer.
84. Permission for entry upon lands to work mines.
85. Entry by corporations to work mines — Condemnation for.
86. Reservation of minerals in patents.

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§ 80. State mines — Sovereign right of people in gold and silver.— The following mines are the property of the people of this state in their right of sovereignty:

1. All mines of gold and silver discovered, or hereafter to be discovered, within this state.

2. All mines of other metals discovered, or hereafter to be discovered, upon any lands owned by persons not being citizens of the United States.

3. All mines of other metals discovered, or hereafter to be discovered, upon lands owned by a citizen of the United States, the ore of which, on an average, shall contain less than two equal third parts in value of copper, tin, iron and lead, or any of those metals.

4. All mines and all minerals and fossils discovered, or hereafter to be discovered, upon any lands belonging to the people of this state.

Michigan.— *Sovereign right of people in minerals.*— That the property in the following mines is fully vested in the people of the state of Michigan in their right of sovereignty:

1. All mines of gold and silver, or either of them, now discovered or hereafter to be discovered within the territorial limits of the state;

2. All mines of other metals, discovered or to be discovered, which are connected with, or shall be known to contain gold or silver in any proportion. Comp. Laws 1857, § 2554; 1871, § 4020; How. Stats., § 5475; Comp. Laws 1897, § 1526.

NOTE.— New York, being one of the original thirteen states, and the owner of all the public lands within its territorial limits, undoubtedly has power to enact such a law as the above. Michigan, being what is commonly called one of the "public land" states, has no control over any lands within its borders, except such as are expressly granted to it by congress, and, therefore, has no power to pass any legislative enactment concerning them. This is discussed in the text, § 24. This applies also to the following Michigan statute:

Same — Against whom enforced.— The sovereign right of the people of Michigan to the mines and minerals therein, as specified in the preceding section, shall never be enforced against any citizen of the state in whom the fee of the soil containing any such mines and minerals now is, or may hereafter become fully vested in his own right by a *bona fide* purchase from, through or under the general or state government; but such mines and minerals shall remain the property of the citizens owning such lands, subject to the specific tax hereinafter provided; provided, that this act shall not be construed to affect any right already

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acquired or held by individuals, from or under the permits or leases of the United States, wherever such leases shall prove to be upon lands now owned or hereafter to become the property of the state. R. S. 1897, § 1527. See also Michigan note to § 86, *post*, pp. 1352–53.

§ 81. Working of mines in state lands — Report to secretary of state.— Any citizen of this state discovering a valuable mine or mineral upon lands belonging to the state and filing the notice of discovery required by this article, may work such mine; and he and his heirs or assigns shall have the sole benefit of all products therefrom on the payment into the state treasury of a royalty of two per centum of the market value of all such products. Such valuation shall be made when such products shall be first in a marketable form. A statement of the amounts sold or removed from the premises covered by such notice of claim, and of all the trees cut or destroyed upon such lands, shall be made semi-annually under oath to the secretary of state, and payments of such royalty shall be made semi-annually to the state treasurer, under oath as to the amount thereof, on the basis of such semi-annual statement to the secretary of state. Any wilful falsehood in the contents of such statement to the secretary of state or state treasurer in regard to such royalty shall work a forfeiture to the state of the value of the whole amount mined during the period covered by such statements.

§ 82. Private property in certain mines.— All mines of whatever description, other than mines of gold and silver, discovered, or hereafter to be discovered, upon any land owned by a citizen of any of the United States, the ore of which, on an average, contains two equal third parts or more in value of copper, tin, iron and lead, or any of those metals, shall belong to the owner of such land.

§ 83. Notice of discovery — Bounty to discoverer.— No person discovering a mine of gold or silver within this state shall work the same until he give written notice thereof to the secretary of state, which shall be registered in a book to be kept by such secretary, describing particularly the

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nature and situation of the mine. Such person and his executors, administrators and assigns, shall be exempted from paying to the people of the state any part of the ore, produce or profit of such mine for the term of twenty-one years, to be computed from the time of giving notice of such discovery; and after the expiration of such term, the discoverer, his heirs or assigns, shall have the sole benefit of all products therefrom on the payment into the state treasury of a royalty of one per centum of the market value of all such products. A statement of the amounts sold or removed from the premises covered by such notice of claim, together with the market values thereof, shall be made semi-annually, under oath, to the secretary of state, and payments of such royalty shall be made semi-annually to the state treasurer, under oath as to the amount thereof, on the basis of such semi-annually [semi-annual] statement to the secretary of state. Any wilful falsehood in the contents of such statement to the secretary of state or state treasurer in regard to such royalty, shall work a forfeiture to the state of the value of the whole amount mined during the period covered by such statements. From time to time the legislature may provide for a different rate of compensation to be paid to the state. As amended by Act April 18, 1901, § 1.

§ 84. **Permission for entry upon lands to work mines.** Nothing contained in this article shall affect any grant heretofore made by the legislature to persons having discovered mines; nor be construed to give any person a right to enter upon or break up the lands of any other person, or of the state, or to work any mine in such lands, unless the written consent of the owner thereof, or of the commissioners of the land office, when the lands belong to the state, shall be previously obtained. Permission to erect buildings for working mines upon state lands within the forest preserve may be given by the forest commission, and elsewhere, by the commissioners of the land office, when such lands are entirely denuded of timber or when such commission or commissioners are satisfied that the erection or oc-

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cupation of such buildings will not be detrimental to the interests of the state. Nothing in this article shall authorize any person working a mine upon state lands to cut or destroy any timber whatever, except such trees as it may be actually necessary to remove in order to uncover or make a road to such mine. For each tree measuring four inches or more in diameter at a height of one foot from the ground, which shall be so cut, the party operating the mine shall pay into the state treasury the sum of one dollar.

§ 85. **Entry by corporation to work mines — Condemnation for.**— Corporations formed for the purpose of working and having lawful authority to work mines found within this state may acquire the right and easement to enter upon and break up lands necessary for the operation of such mines, and if the written consent of the person in or upon whose land such mine or mines are found shall be refused or cannot be obtained by agreement, or by reason of the infancy or absence of such person from the state, or other legal disability of the owners of such lands, every such corporation may acquire such right and easement by condemnation, which right and easement when so acquired shall be deemed to have been so granted for a public use and for the public purpose of obtaining minerals reserved to the state. Before instituting any proceeding for such condemnation the corporation shall file with the commissioners of the land office, a full description of the location of such lands and obtain a grant of the right to acquire such right and easement from such commissioners who are authorized to make the same and fix the terms thereof.

NOTE.— For a summary of the different state statutes upon the subject of eminent domain, see *post*, this Appendix, VII, 1, p. 1365.

§ 86. **Reservation of minerals in patents.**— (R. S. 1889, p. 618, § 5.) All letters patent hereafter to be granted, shall be in such form as the commissioners shall direct, and shall contain an exception and reservation to the people of this state of all gold and silver mined.

Michigan.— All lands known to contain mines or mineral which are, or which may hereafter become the property of this state, shall be re-

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served from sale by the authorities thereof, until directed to be sold by and under such regulations as the legislature shall hereafter prescribe. Comp. Laws 1897, § 1528.

California and Nevada.—Compare § 84, *ante*, and note; also § 88, pp. 1317, 1318, and note.

VI.

The Statute of Texas.

An Act to better and more fully promote the development of the mining resources of Texas, and to repeal all laws in conflict with the provisions of this act.

1. Location, Acquisition and Development of Lode Claims.
   - § 88. (1) Mineral lands reserved from sale — Open to location by citizens and those who have declared intention.
   - 89. (2) Duty of certain state officers to designate mineral lands.
   - 90. (3) Commissioner of general land office to create mining districts — Surveyor for.
   - 91. (4) What may be located as mineral — Size of claim — Boundary lines drawn vertically.
   - 92. (5) Acts of location — Description in notice.
   - 93. (6) Work to be done within three months — Application for survey — Contents — Duty of surveyor.
   - 94. (7) Annual labor — Proof of — Duty of co-owners with reference to.
   - 95. (8) Rights of parties running tunnel for development of vein.
   - 96. (9) Application for patent within five years — Fees.
   - 97. (10) Procedure to obtain patent for lands containing minerals other than the precious metals — Purchase price — Right to prospect certain lands.
   - 98. (11) Protest against issuance of patent — Contents — Suit within thirty days.
   - 99. (12) Forfeiture for failure to apply for patent within five years or to perform assessment work — Not to be relocated by original owners.
   - 100. (13) No relocation for thirty days after forfeiture — Commissioner may grant relief against, when.
   - 101. (14) Non-mineral affidavit where title sought to be acquired other than as mineral land.
2. Location and Acquisition of Placers.
   - § 102. (15) Proceedings to obtain patent to placers similar to lode.
3. Mill Sites.
   - § 103. (16) Size — Procedure to obtain.

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4. Miscellaneous Provisions.
a. Timber may be felled for mining purposes.
b. Provisions of act not applicable to claims before its passage.
c. Application of proceeds from sale.
d. Surveyors may administer oaths, etc.

Note.—The section numbers here are arbitrarily arranged to conform to the section numbering of this appendix. The numbers in parentheses ( ) denote the correct numbers of the sections of the act.

1. Location, Acquisition and Development of Lode Claims.

§ 88. (1) [**Mineral lands reserved from sale—Open to location by citizens and those who have declared intention.**]—That all public school, university, asylum and public lands specially included under the operation of this act, all the lands owned by the state, situated within the reservation known as the "Pacific Reservation," which were taken off the market and reserved from sale by an act approved January 22, 1883, containing valuable mineral deposits, are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law, by citizens of the United States and those who have declared their intention of becoming such: *Provided*, that all who have located and recorded valid claims under previous valid laws and have not abandoned same, but are engaged in developing same, shall have a prior preference right for ninety days after the passage of this act in which to relocate same under this act.

§ 89. (2) [**Duty of certain state officers to designate mineral lands.**]—It shall be the duty of the commissioner of the general land office immediately upon the passage of this act to have a map made showing the location of all public school, university, asylum and public lands which are unsold at that date, and it shall be the duty of the geological and mineralogical survey to examine all such lands as soon as practicable thereafter, and to designate such tracts as are apparently mineral bearing as mineral lands for the purposes of this act. If mineral lands are after-

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wards claimed\to exist at other locations than are so designated they shall also be examined and classified accordingly.

§ 90. (3) [**Commissioner of general land office to create mining districts — Surveyor for.**] — It shall be the duty of the commissioner of the general land office to unite a suitable number of these mineral locations into mining districts, in each of which shall be a surveyor, who must either be the surveyor of the district or county or a regular appointed deputy and an officer qualified to administer oaths.

§ 91. (4) [**What may be located as mineral — Size of claim — Boundary lines drawn vertically.**] — A mining claim upon veins or lodes of quartz or other rocks in place bearing silver, gold, cinnabar, lead, tin, copper and other valuable metals, excluding deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marls, natural cement, clay, onyx, mica, precious stones, or any other non-metallic mineral, and stone valuable for ornamental or building purposes or other valuable building material, may equal but shall not exceed one thousand five hundred feet along the mine or vein or lode. No such claim shall exceed twenty-one acres in total area. The end lines of each claim shall be parallel to each other, and all claims shall be in the form of a parallelogram or square, unless such form is prevented by adjoining rights or boundaries of the section in which the claim lies. The locator under this act shall be entitled to the use of all the superficial area between the inclosing lines of the claim, and to all the minerals thereon and between the side and end lines, extending downwards vertically, until the rights secured by the posting are forfeited as provided; and in all conflicts priority of location shall decide.

§ 92. (5) [**Acts of location — Description in notice.**] — The locators of any mining claim shall post up at the center of one of the end lines of the same a written notice, stating the name of the location and of the claim and date

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of posting, and describe the claim by giving the number of feet in length and width and the direction the claim lies in length from the notice, together with the section, if known, and the county, and shall place stone monuments at the four corners and otherwise describe the corners so that they can be readily found. The notice shall be placed in a conspicuous place so it can be readily seen.

§ 93. (6) [**Work to be done within three months — Application for survey — Contents — Duty of surveyor.**] — The locator shall, within three months after the date of the posting of the required notice, sink a shaft at least ten feet in depth by four feet square, or a tunnel of the same dimensions ten feet in length, or an open cross-cut twenty feet in length, four feet or more wide and ten feet in depth at its shallowest part, and shall within said time file with the county surveyor or the district surveyor of the county, as the case may be, an application in writing for the survey of the claim, which application shall be accompanied by a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the required work, signifying that it has been done, and that the locators have found valuable minerals on the claim; and the affidavit shall state the date of the first posting of the notice on the claim by the applicants, and further, that the notice has not been postdated or changed in its date. Upon receiving said application and fee the surveyor shall record the application, together with the affidavit, and he shall thereupon forthwith proceed to survey said claim, and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved party such damages as he may sustain, and in addition thereto shall be deemed guilty of a misdemeanor, and on conviction fined not less than twenty dollars nor more than one hundred dollars, and it shall be the duty of the applicants to see that the field-notes are so returned. The fee of twenty dollars shall cover all the services provided for in this section. In all

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other cases enumerated in this act the fee shall be the same allowed county clerks for similar services.

§ 94. (7) [**Annual labor — Proof of — Duty of co-owners with reference to.**] — Annually after the filing of the application for a survey as hereinbefore provided, the claimant shall, until the application is made for a patent, as hereinafter provided, do one hundred dollars' worth of work in developing each claim; but where claims adjoin, the amount of work may be done on one for all belonging to the same party. The value of such shall be estimated at what it could be contracted for at a fair cash price, but the cost of tools and implements and the expense of going to and returning from the mine shall not be included in the said estimate. Within one month after the expiration of each year the owner shall make and file with the surveyor his affidavit setting forth specifically what the work consists of in detail, and the value thereof. Upon the failure of any one of several owners to contribute his proportion of the expenditures required in this act within the necessary time, the co-owners who have performed the labor or made the improvements or paid the fees or other expenditures required in this act, may at the expiration of the year in which the same is to be done, give notice in writing or notice by publication in a newspaper published in the county where the claim is, if any; if none in such county, then in the newspaper published nearest the mine, for at least once a week for ninety days. If after such personal notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this act, his interest in the claim shall become the property of his co-workers who have made the required expenditures. An affidavit by the co-owners forfeiting the interest of such delinquent shall, when recorded in the office of the proper surveyor, be sufficient evidence of such delinquency.

§ 95. (8) [**Rights of parties running tunnel for development of vein.**] — When a tunnel is run for the development of a vein or lode or for the discovery of mines, the

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owner of the tunnel shall have the right of possession of all veins or lodes within two thousand feet of the face of such claim on the line thereof, not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence shall be invalid; but failure to prosecute the work in the tunnel for six months shall be considered as an abandonment of the right of all undiscovered veins on the line of said tunnel.

§ 96. (9) [**Application for patent within five years — Fees.**] — Whenever the owners of any mining claim shall desire a patent, they shall, within five years after the filing of the application for survey, file their application for a patent upon their claim with the commissioner of the general land office, accompanied by the receipt of the state treasurer showing that twenty-five dollars per acre has been paid by the applicant for patent to the state treasurer. Whereupon such patent shall issue unless protest is filed as hereinafter provided for in section 11.

§ 97. (10) [**Procedure to obtain patent for lands containing minerals other than the precious metals — Purchase price — Right to prospect certain lands.**] — Within twelve months after the filing of the affidavit hereinafter provided for, any person or association of persons qualified as required by section 1 of this act, shall have the right to purchase and obtain patent by compliance with this act, or (for) any of the lands of the state which are specified or included in section 1 of this act, containing valuable deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marl, natural cement, clay, onyx, mica, precious stones, or any other non-metallic mineral and stones valuable for ornamental or building purposes or other valuable building material, in legal subdivisions, in quantity not exceeding one section: *Provided*, that where any such parties shall have

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heretofore expended, or shall hereafter expend, five thousand dollars in developing the aforesaid mineral resources of any of said lands, such party shall have the right to buy one additional section and no more, and to include in the purchase any section or part thereof on which the work may have been done. The land so purchased may be in different sections, and all embraced in one or more obligations, not to exceed the quantity stated. The purchaser shall pay not less than fifteen dollars per acre where the land shall be situated ten miles or less of (from) any railroad in operation, and not less than ten dollars per acre where the land is over ten miles from such railroad, one-tenth of the purchase-money to be paid in cash to the state treasurer on or before the expiration of the twelve months aforesaid; and the purchaser shall file the treasurer's receipt with the commissioner of the general land office, together with an obligation to pay the state of Texas the remainder in nine equal annual instalments, with interest at four per cent. per annum from date, subject to forfeiture as in other cases; and all said lands are reserved from sale or other disposition than under this act; and where application is made to buy any of the lands herein named except under this act, the purchaser shall swear that there are none of the minerals named in this act on said lands, so far as he knows or has reason to believe or does believe: *Provided, further*, that any party hereinbefore named, who shall prior to the passage of this act have been the first to work on said lands for the development of said mineral resources, and who has not abandoned said work, and is qualified at passage of this act to buy, shall have a prior preference right of doing so for thirty days after this act goes into effect: *Provided, further*, this section of this act shall not authorize the sale of lands containing valuable deposits of gold, silver, lead, cinnabar, copper or other valuable metal: *Provided, further*, that any person desiring to acquire any lands under the provisions of this section shall have the right to prospect said land for a period of twelve months before making any payment thereon, upon condi-

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tion that said prospector shall file with the proper surveyor his affidavit in writing, setting forth that he has gone upon the land in good faith with the intention of purchasing the same under the provisions of this section, and in said affidavit give a reasonable description of said land. After the filing of said affidavit the said surveyor shall immediately forward same to the commissioner of the general land office, who shall take said section off the market until the expiration of said twelve months after the filing of said affidavit with the surveyor.

§ 98. (11) [**Protest against issuance of patent — Contents — Suit within thirty days.**] — Any person desiring to contest the issuance of patent may do so by filing with the commissioner of the general land office a protest setting forth the grounds of objection generally, and that protestant has an interest in the subject-matter, which protest shall also state that the same is presented in good faith and not to injure or delay the applicants or any of them, and the same shall be verified by affidavit. Whereupon it shall be the duty of the commissioner to withhold patent until the controversy is ended: *Provided*, that if the protestant shall not within thirty days after filing his protest institute suit in the court having jurisdiction thereof in the county where the claims are located, his protest shall constitute no further barrier to the issuance of patent. A certified copy of the petition or a certificate of the clerk of the court where suit is pending shall be sufficient evidence to the commissioner of the pendency of the suit, and of the date of filing said suit. When the land in controversy lies partly in two counties suit may be brought in either. More than one claim shall not be embraced in the same patent or application. The suits here provided for shall be entitled to precedence of trial on the docket.

§ 99. (12) [**Forfeiture for failure to apply for patent within five years or to perform assessment work — Not to be relocated by original owners.**] — All claims upon which patent has not been applied for within five years

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next after the application for survey, or which have not been surveyed, and the field-notes returned to the general land office within the time prescribed therefor as hereinbefore provided, or upon which the assessment work has not been done, an affidavit therefor filed as provided by this act, shall be and are declared forfeited without judicial action of any kind, and subject to location as originally, but not by any one interested in the claim at the time of forfeiture, and any location for or on behalf of any such party shall be wholly void. Whenever any such claim shall be relocated, the locators and each of them shall make affidavit that the location is made without any contract or agreement of any kind that any of the parties owning an interest in the location before the relocation has or is to have any interest in the same. In all other cases where affidavit is required by this act it may be made by one or more of the parties cognizant of the facts.

§ 100. (13) [**No relocation for thirty days after forfeiture — Commissioner may grant relief against, when.**] No claim which has been forfeited for any cause shall be subject to relocation for a period of thirty days next thereafter, and the party owning the same may apply to the land commissioner within that time for relief, and if it appear to him from the proof submitted that the forfeiture was not occasioned by the negligence of the owner, but by circumstances which he could not reasonably control, the commissioner may within that time, in his discretion, grant relief against the forfeiture, and if he be granted such relief he shall at once forward his order to that effect to the surveyor, who shall file the same for record in his office.

§ 101. (14) [**Non-mineral affidavit where title sought to be acquired other than as mineral land.**] — Whenever any application shall be made to buy or obtain title to any of the lands embraced in section 1 of this act, except where the application is made under this act, the applicant shall make oath that there is not, to the best of his knowledge

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and belief, any of the minerals embraced in this act thereon, and when the commissioner has any doubt in relation to the matter he shall forbear action until he is satisfied. Any such sale or disposition of said lands shall be understood to be, with the reservation of the minerals thereon, to be subject to location as herein provided.

2. Location and Acquisition of Placers.

§ 102. (15) [Proceedings to obtain patent to placers similar to lode.] — That claims usually called placers, including all forms of metallic deposits excepting veins of quartz or rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims. All placer claims located shall conform as near as practicable with existing surveys and their subdivisions, and no such location shall include more than forty acres for each individual claimant, and shall not exceed three hundred and twenty acres for any association of persons. The price which shall be paid for such placer shall not be less than ten dollars per acre, together with all costs of proceedings as before provided.

3. Mill Sites.

§ 103. (16) [Size — Procedure to obtain.] — Where non-mineral land not contiguous to the vein or lode is issued (used) by the prospector of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such non-adjacent lands shall exceed ten acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner

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of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for a mill site, as provided in this section.

4. Miscellaneous Provisions.

a. (17) [**Timber may be felled for mining purposes.**] — Any owner or worker of (a) mining claim under this act is authorized to fell and remove for building and mining purposes any timber or any tree growing or being upon unoccupied lands as described in section 1, said lands being mineral and subject to entry only as mineral lands, under such rules and regulations as may be prescribed for the protection of timber and undergrowth upon such lands, and for other purposes.

b. (18) [**Provisions of act not applicable to claims before its passage.**] — Nothing in this act shall ever be so construed as to either destroy, invalidate or impair any valid claim, right or interest existing in, to or concerning any lands whatever at the passage of this act, of any pre-emptor, purchaser, claimant, actual settler, locator or other person whatsoever.

c. (19) [**Application of proceeds from sale.**] — The net proceeds of all sales of mining lands under the provisions of this act shall inure to the benefit of the state and the respective funds for which the lands mentioned in section 1 of this act are now set apart under the constitution and the laws of the state, and it shall be the duty of the comptroller, state treasurer and commissioner of the general land office to see to it and have said proceeds so paid rightly placed to the credit of the particular and proper fund.

d. (20) [**Surveyors may administer oaths, etc.**] — For the purpose of effectually carrying out the provisions of this act all county and district surveyors are hereby especially authorized and empowered to administer oaths, take affidavits and make certificates thereof: *Provided, further*, that all laws and parts of laws in conflict with this act, or any part thereof, are hereby especially repealed.

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VII.

REFERENCE TO MISCELLANEOUS LEGISLATION IN THE DIFFERENT STATES ON MATTERS RELATING TO MINING, ANNOTATED.

1. Eminent domain.
   Act granting right of way over mining claims for certain purposes.
2. Miners' and mechanics' liens.
3. Taxation of mining claims.
4. Prescribing certain rules governing the trial of actions involving the title to mining claims and mines.
   a. Miners' rules as evidence.
   b. Permitting judge to order survey, upon application, in certain cases of conflicting claims.
   c. Providing for a continuance of the trial until further developments.
   d. Defining nature of plaintiff's possession.
   e. Permitting judge to issue peremptory order for possession.
   f. Special verdict.
   g. Limitation of action for trespass or waste, or adverse possession.
   h. Jurisdiction in adverse suits.
5. Trespassing upon mining property.
6. Summary disposal of mining property.
7. Authorizing leasing of mining property.
8. Provisions relating to coal mining.
   a. Inspection — Prohibiting women and children in.
   b. Weighing coal at mine.
9. Other police regulations — Safety appliances — Protection for miners and the public against injuries from unused mine openings.
   a. Hours of employment.
   b. Regulating the payment of wages of miners.
   c. Safety apparatus.
   d. Regulating the storage of explosives.
   e. Requiring miners to be brought to the surface for meals.
   f. Relating to damages to shafts by live stock.
   g. Protection against injury from unused shafts and openings.
   h. Providing for uniform system of bell signals.
   i. Medical attendance for smelter employees.
   j. Providing against gases in smelters.
   k. Fire protection in mines.
10. Relating to mining corporations.

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11. Relating to minerals, including oil and gas, in state lands.
12. Relating to the establishment of state bureau of mines.
13. Relating to mining property not capable of partition.
14. Relating to the disposition of tailings.
15. Undertaking to define the rights of aliens.
16. Assuming to grant certain privileges to Indians.
17. Exempting soldiers' claims from forfeiture.
18. Mining claims not affected by town-site patents.
19. Defining fixtures.
20. Relating to co-tenants.
21. Requiring smelters to keep correct books.
22. Making it the duty of certain officers to furnish legislature with statistics.
23. Relating to the formation of mining districts.
24. Penal provisions.
    a. Penalty for destroying or tearing down location notices or boundary marks.
    b. Penalty for "salting."
    c. Penalty for false bookkeeping by smelters and reduction works.
    d. Counterfeit gold dust — False scales for weighing gold dust.
    e. Conspiracy and force to gain possession of mining property.
    f. Penalty for failure to deliver product of custom mill to proper owner.
    g. Penalty for attempt to rob quartz mills.
    h. Penalty for robbing mines.
    i. Penalty for blackmailing mining property.
    j. General provisions relating to the operation of coal mines, and prescribing a penalty for violation of certain rules and regulations in connection therewith.
25. New Mexico provision permitting owner of patented lands to make rules.

1. Eminent domain.— The right of eminent domain for mining purposes is expressly recognized by statute in many of the states. The law of California is a typical one, and we will therefor copy it, following it with a reference to the place where this subject is treated in the statutes of other states.

Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

. . . 5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also channels, natural

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or otherwise, for the flow, deposit, or conducting of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings, or refuse matter from mines. Deering's Ann. Code, § 1238, as amended by Laws 1895, p. 89, in effect July 1, 1895.

Act granting right of way over mining claims for certain purposes.— All mining locations and mining claims shall be subject to the reservation of the right of way through or over any mining claim, ditches, roads, canals, cuts, tunnels, and other easements for the purposes of working other mines; *provided*, that any damage occasioned thereby shall be assessed and paid for in the manner provided by law for land taken for public use under the right of eminent domain. Laws 1891, p. 220, in effect March 31, 1891.

Colorado.— See, generally, Mills' Ann. Stats., § 3138. For hauling ores, Id., § 3145. For connecting spur to railroad, Laws 1901, p. 237.

Idaho.— Civ. Code 1901, §§ 2572, 2573.

Illinois.— Starr & Curtis' Ann. Stats. 1885, p. 1626, § 1.

Iowa.— For railway to mines, Ann. Code 1897, § 2031. For drainage. Id., § 1967.

Kentucky.— For the purpose of safety shaft in coal mines where owner of mine has not sufficient land for that purpose. R. S. 1894, § 2730.

Maryland.— To mining companies for construction of railroads, etc., Pub. Laws 1888, vol. 1, pp. 381–384.

Michigan.— Right to water for mining, Act May 14, 1877, § 14, Comp. Laws 1897, §§ 7109, 7110.

Montana.— Rev. Pol. Code 1895, §§ 3630, 3641.

Nevada.— Comp. Laws 1900, § 283 *et seq.*

New Mexico.— For tramways, etc., Comp. Laws 1897, § 2328. Generally, Id., §§ 2329–2336.

New York.— See *ante*, § 85, p. 1852.

North Carolina.— For mining generally, Code 1883, §§ 3293–3300.

Oregon.— Locations upon natural streams near placer mines are subject to the right of mines in operation before such location to discharge tailings thereon in the same manner which it had previously been done. Laws 1901, p. 122.

Tennessee.— To mining corporations generally. R. S. 1884, § 1854.

Utah.— R. S. 1898, § 3588, subd. 6, as amended by Laws 1901, p. 19.

Washington.— For canals, ditches and flumes, Laws 1899, p. 261. For mining, milling and reduction works companies, Laws 1897, p. 95.

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Wisconsin.— For conducting water to mines, R. S. 1898, pp. 1193, 1194, §§ 1650–1655. Generally, Id., p. 1027, § 1879, subd. 1–10.

Wyoming.— For tramways, water ditches, flumes, pack trails, etc., R. S. 1899, § 2536.

This subject is discussed in the text, § 1070 *et seq.*

2. Miners' and mechanics' liens.— Many of the statutes have provisions to the effect that any person doing work or furnishing materials or fixtures for any mining claim or mill, is entitled to a lien upon the mine, if operated by the owner thereof, and upon the leasehold interest of the lessee in many states, notice of which must be given by the person against whom it is claimed by filing a verified notice of lien with the county recorder or register of deeds of the county wherein the property is situate, within a given time, generally sixty days from the last item. These statutes are found in the following states:

Arizona.— Must file notice with county recorder within ninety days. R. S. 1901, §§ 2889, 2904.

Colorado.— File with county recorder within one month for common laborers, two months for subcontractors, and three months for contractors. Laws 1899, pp. 261, 266, 270, §§ 4, 9.

Idaho.— Must file notice with the county recorder within sixty days after the last item. Code Civ. Proc. 1901, sec. 3340. Requires any person operating mining property, before employing miners or laborers, to post up in the principal office of such operator, and file with the county and district recorder, if there is one, a sworn statement of the terms upon which the work is being performed. Failure is a misdemeanor. Penal Code 1901, secs. 638, 639.

Indiana.— For wages of coal miners. File with county recorder within sixty days, suit within one year. R. S. 1881, § 5471.

Michigan.— Comp. Laws 1897, § 10755.

Missouri.— R. S. 1899, § 8792. Enforced same as other liens.

Montana.— File notice with county clerk within ninety days. Rev. Code Civ. Proc., §§ 2130–41.

Nevada.— Record with county recorder within sixty days. Comp. Laws 1900, §§ 3881–3885. Party furnishing ore to custom mill or reduction works has lien on bullion. Id., § 3901, Act February 24, 1877.

North Dakota.— File with county clerk within sixty days. R. S. 1899, §§ 4805–4809, 4812.

Ohio.— R. S., § 3184*a*. passed March 27, 1889.

Oregon.— Record with county recorder within sixty days, suit within six months. Act February 20, 1891, Laws 1891, p. 76, as amended by Laws 1899, p. 180.

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South Dakota.— File with clerk of district court within sixty days. Comp. Laws Dak. Ty. 1887, §§ 2936, 2940, 2943, as adopted by state legislature. Post in a conspicuous place correct copy of all mortgages or liens against the property. Act March 23, 1899.

Utah.— File with county recorder within sixty days. R. S. 1898, §§ 1381, 1382.

Virginia.— File in office of clerk of court of city or county within six months. Code 1887, §§ 2485, 2486. Manner of enforcing. Id., § 2491.

Washington.— File with county auditor within ninety days. Hill's Ann. Code and Stats., vol. 1, §§ 1663–1667.

Wisconsin.— File notice with county recorder within sixty days. R. S. 1898. § 3242, p. 2269.

This subject is discussed in the text, § 1680 *et seq.*

3. Taxation of mining claims.

Colorado.— Taxes all mines of gold, silver, copper and lead, with a gross output of more than one thousand dollars per year, upon assessed valuation of one-fourth such gross output. Claims containing other minerals are assessed the same as other real estate. Laws 1901, pp. 241, 279–81, repealing all former laws on the subject.

Michigan.— Tax of four per cent. levied upon all ores taken from mines in the state, in lieu of all other taxes. Comp. Laws 1897, § 1329.

Montana.— Patented claims taxed at price paid government, except where surface used for other purposes, then at full value. Rev. Pol. Code 1895, § 3672.

Nevada.— Taxes net proceeds of mines. Act March 23, 1891, § 75; Comp. Laws 1900, § 1147.

New Mexico.— No tax on unpatented mining claims, and none on patented claims until one year after issuance of patent. Act March 16, 1899, § 1.

Utah.— Taxes net proceeds, surface improvements, and patented claims at value paid government. R. S. 1898, § 2504; Id., §§ 2566–2573, as amended 1899, pp. 103–105.

Washington.— Taxes mining claims at such valuation as they, including minerals, would bring at voluntary cash sale. Laws 1897, § 42, p. 155, ch. 71. Taxes coal mines four mills on each ton of coal sold or used, proceeds to be applied in payment of salary of state coal mine inspector. Hill's Ann. Stats., §§ 2217–2244; Laws 1897, pp. 57–62.

4. Prescribing certain rules governing the trial of actions involving the title to mining claims and mines.

a. Miners' rules as evidence.— In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages or regula-

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tions when not in conflict with the laws of this state, shall govern the decision of the action. Cal. Code C. P., § 748.

Idaho.— Code Civ. Proc. 1901, sec. 8388.
Montana.— Rev. Code Civ. Proc. 1895, § 1321.
North Dakota.— R. S. 1899, § 5918.
Utah.— R. S. 1898, § 3521.
Wisconsin.— See Wisconsin note, § 69, *ante*, subd. 8, p. 1348.
This subject is discussed in the text, §§ 68, 69, 441.

b. Permitting judge to order survey, upon application, in certain cases of conflicting claims.

Colorado.— Of the underground workings or surface. Mills' Ann. Stats., § 3164.
Idaho.— Code Civ. Proc. 1901, secs. 2283, 3384.
Illinois.— Starr & Curtis's Ann. Stats. 1885, §§ 1627, subd. 2, 3, 4.
Missouri.— R. S. 1899, § 8772.
Montana.— Rev. Code Civ. Proc. 1895, § 1314.
Nevada.— Comp. Laws 1900, § 252.
New Mexico.— Comp. Laws 1897, § 2293. The mode of procedure to obtain this order is elaborately provided for. Id., §§ 2293–2296.
North Dakota.— R. S. 1899, § 1442.
Utah.— R. S. 1898, § 3515.
See text, §§ 1637–1639.

c. Providing for a continuance of the trial until further developments, where the judge is satisfied that the same is necessary and that substantial justice will thereby be done.

Nevada.— Comp. Laws 1900, § 3255.
Utah.— R. S. 1898, § 3134.
Wisconsin.— R. S. 1898, § 1648.

d. Defining nature of plaintiff's possession.

Colorado.— In trials for wrongfully taking ore, where plaintiff shows himself entitled to recover, he is deemed to be in possession of all parts of the mine, whether accessible from his own works or not. Laws 1893, p. 349.

e. Permitting judge to issue peremptory order for possession.

North Dakota.— Where party was dispossessed on Sunday, a legal holiday, or while temporarily absent. R. S. 1899, § 1442.

f. Special verdict.

New Mexico.— Court may require a special verdict or make a special finding, in an adverse suit, showing the exact part of the claim to which each party is entitled. Comp. Laws 1897, § 2291.

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Special finding that neither party entitled, see subsequent enactment as note to sec. 2326, R. S. U. S., Appendix A, *ante*, p. 1244.

g. Limitation of action for trespass or waste, or adverse possession.

Nevada.— Plaintiff must have been in possession in person or by grantors within two years. Comp. Laws 1900, § 3706; Act November 21, 1861, as amended by Laws 1867, p. 85.

Utah.— Suits for trespass or waste must be commenced within three years after discovery of trespass. R. S. 1898, § 2877, subd. 2.

h. Jurisdiction in adverse suits.

Nevada.— In suits based upon adverse claims it is only necessary, to confer jurisdiction upon the court, that it appear that an application for patent has been made, and that the parties are claiming the right to some portion of the vein or lode. Act February 10, 1873; Comp. Laws 1900, § 3985.

5. Trespassing upon mining property.

Illinois.— Penalty for wilful trespass upon mining property, five hundred dollars in addition to damages, to be recovered in an action for debt in any court by the owner. Starr & Curtis's Ann. Stats. 1885, § 5, p. 1627.

Nevada.— See Nevada note, *ante*, § 73, p. 1346.

New Mexico.— Court has power to issue injunction restraining interference with possession of person lawfully and peaceably in possession of mining property. Comp. Laws 1897, § 2313.

Utah.— Person wrongfully taking ore from the premises of another is liable to the owner for three times its value. R. S. 1898, § 1536.

See a discussion of this in the text, § 1637 *et seq.* See also *ante*, this subhead, 4, *b*, *c*, p. 1369; *post*, this subhead, 24, *a*, *g*, *h*, pp. 1279, 1300.

6. Summary disposal of mining property belonging to minors or estates of deceased persons.

Arizona.— Authorizes the court, upon the petition of the guardian or administrator, to order a summary disposal of property which the inventory shows to consist of mining property. R. S. 1901, §§ 1772–76.

Idaho.— Has special provision for disposing of mining property of deceased person and permits foreign administrator to take charge of property within the state for that purpase. Code Civ. Proc. 1901, secs. 4166–4170.

Montana.— Same. Rev. Civ. Code 1895, §§ 2660–64.

7. Authorizing leasing of mining property belonging to minor or estate of deceased person.

Arizona.— R. S. 1901, §§ 2013–17.

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8. Provisions relating to coal mining.

a. Inspection — Prohibiting women and children in.— In nearly all the states where coal is mined to any extent, statutory provisions have been enacted governing the working and operation of mines, providing for inspection, etc. These statutes, while not so elaborate in detail in the other states, are all taken largely from the law of Pennsylvania. They provide generally for the appointment of one or more mine inspectors, whose duty is to examine all mines in his district, make any suggestions which he may deem advisable concerning the operation thereof, and make regular reports to the governor or some other state officer. They also require that the owner or proprietor of coal mines shall cause to be prepared and furnished to the inspector an accurate map of all the underground workings, which must be carefully revised as often as once in six months. Also for the establishment of at least two openings or escapement ways, and for means of ventilation sufficient to provide at least fifty cubic feet of pure air per minute for each man employed in the mine. Also prohibiting the employment of women, or children under the age of fourteen years, and, in some of the states, any intoxicated person, in any coal mine.

These statutes have no direct bearing upon the law of mining rights, being rather police regulations for the protection of miners. A complete copy of them would therefore not be advisable here. They are found in the following states:

Alabama.— Divided into three inspection districts under the supervision of one chief inspector and two associate inspectors appointed biennially by the governor; report biennially to the governor. R. S. 1896, vo'. 1, §§ 2899–2933.

Arkansas.— One coal mine inspector appointed by the governor. Sandels & Hill's Stats. 1894, §§ 5045–5062.

Colorado.— One inspector appointed by the governor. Prohibits children under twelve, under sixteen unless able to read and write, and women from working in mines. Mills' Ann. Stats., §§ 3181–3204.

Idaho.— One inspector elected every two years; report to governor in December of each year. Pol. Code 1901, §§ 139–152.

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Illinois.— Divided into five inspection districts, each under supervision of an inspector appointed by governor upon recommendation of board of examiners. Starr & Curtis's Ann. Stats. 1885, pp. 1616–1625.

Indiana.— One mine inspector. Prohibits employment of women and children. R. S. 1881, §§ 5473–5480.

Iowa.— Three inspectors appointed by the governor; report to governor. Ann. Code 1897, §§ 5478–5496.

Kentucky.— One inspector and assistant appointed by governor. Prohibits employment of women and children. R. S. 1894, §§ 2722, 2739.

Michigan.— One inspector in each county of Upper Peninsula to be appointed by the board of county commissioners; report to county commissioners. Comp. Laws 1897, §§ 5492–5499.

Missouri.— Bureau of mines, two inspectors, one for coal and one for zinc mines, appointed by governor; report to governor in April of each year. R. S. 1899, §§ 8797, 8826; §§ 8818 and 8828, amended March 27, 1901, and March 12, 1901.

Montana.— One inspector appointed by governor. R. Pol. Code, 1895, §§ 580–590. Relating to maps, etc. Id., §§ 3350–3365. Prohibiting the employment of women and children. Id., § 474.

New Mexico.— Has usual provisions for ventilation, etc., but does not provide for the appointment of an inspector. This statute has some very rigid penal provisions, and the legislators evidently thought that with these a mining inspector would be entirely unnecessary. Comp. Laws 1897, §§ 2339–2349.

New Jersey.— Duty of factory and work-shop inspector to inspect mine; has discretion of closing mine down if law not complied with. Laws of 1894, p. 66, §§ 1–4; R. S. 1895, §§ 37–40.

Ohio.— One chief inspector appointed by governor who has power to appoint seven district inspectors with the approval of the governor; district inspectors report to chief inspector, who compiles their reports and makes report to the governor. R. S., §§ 290–306a.

Pennsylvania.— Divided into eight districts for anthracite coal, each under the supervision of an inspector appointed by a board of examiners selected by the judges of the court of certain counties; forbids employment of women and children; inspectors shall make annual report to the secretary of internal affairs. Act June 2, 1891, as amended April 20, 1899.

For bituminous coal mines the state is divided into such mining districts as may be fixed by the examining board, no district to contain less than sixty nor more than eighty mines; a board of inspectors for bituminous mines is appointed by the governor in January of each year, such board to consist of two mining engineers of good repute and three other persons who shall have passed successful examinations, qualifying them to act as mine inspectors; vacancies occurring on this board are filled by the governor from a list on file in his office of per-

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sons having passed satisfactory examinations. Women and children are also prohibited from working in bituminous mines. Act May 15, 1893, as amended April 28, 1899.

Utah.— One mine inspector appointed by the governor; report to the governor once each year. Sess. Laws 1901, pp. 83–91. Children under fourteen and women prohibited from working in coal mines. R. S. 1898, § 1338.

Washington.— Divided into two districts, each under supervision of an inspector appointed by the governor, under the advice of a board appointed by him, consisting of three practical coal miners, three competent coal mine operators and one mining engineer. Women and children are prohibited from working in coal mines. Hill's Ann. Stats., vol. 1, §§ 2217–2244.

West Virginia.— Divided into five districts, each under the supervision of a district inspector appointed by the governor, who shall also appoint one chief mine inspector; each district inspector shall report monthly to the chief inspector, who shall copy the same in a book kept for that purpose open to inspection by any citizen of the state. Acts 1901, ch. 106, in effect May 15, 1901. The employment of women and children is prohibited. Acts 1891, ch. 15.

Wisconsin.— Prohibits women and children from working in mines, except pursuant to order of court, or where children work for parents outside of school hours. R. S. 1898, § 1728, p. 248.

Wyoming.— One mine inspector appointed by the governor. R. S. 1899, §§ 2562–2585.

b. Weighing coal at mine.— Prohibiting screening before weighing; providing for check-weighman; penalty for false scales.

Alabama.— R. S. 1896, §§ 2907, 2909.
Colorado.— Laws 1901, p. 235.
Missouri.— R. S. 1899, §§ 8786–90. Inspector to test scales, § 8790.
New Mexico.—Comp. Laws 1897, §§ 2350–54.
Ohio.— R. S., §§ 295*a*, *b*, *c*, Act April 21, in force September 1, 1898.
Utah.— R. S. 1898, §§ 1529–34.
West Virginia.— Act May 23, 1901; Acts 1901, ch. 20.
Wyoming.— R. S. 1899, § 2584.
Noticed in text, § 1640 *et seq.*

9. Other police regulations — Safety appliances — Protection for miners and the public against injuries from unused mine openings.

a. Hours of employment.

Michigan.— Ten hours. Comp. Laws 1897, § 5453.

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Missouri.— Eight hours in all mines. R. S. 1899, § 8793, as amended by Act March 23, 1901.

Montana.— Eight hours for hoisting engineers. Laws 1899, p. 70.

Utah.— Eight hours in all underground mines and smelters. R. S. 1898, § 1337.

Wisconsin.— Eight hours where no contract to the contrary. R. S. 1898, § 1729, p. 1247.

Wyoming.— Eight hours in all mines. R. S. 1899, §§ 2586, 2587.

b. Regulating the payment of wages of miners.

Missouri.— Miners to be paid as often as once every two weeks; coal-mining companies may contract for payment once each month. R. S. 1899, § 8791.

New Mexico.— Unlawful to pay in scrip or store pay. Comp. Laws 1897, § 2355.

Ohio.— Pay at least twice each month, in cash. Act March 27, 1887, Laws 1887, p. 214. Unlawful to pay in scrip or store pay. R. S., §§ 7015, 7016.

West Virginia.— Pay every two weeks in cash. Unlawful to attempt to compel miners to take pay in goods from any store. Acts 1899, ch. 76; Warthe's Code, 1899, p. 1058. See text, § 1640 *et seq.*

Wyoming.— Miners must be paid at least twice each month. Unlawful to offset any account against wages, unless pursuant to previous contract. R. S. 1899, § 2590 *et seq.*

c. Safety apparatus. Requiring iron bonneted safety cages in mines having a vertical shaft of a certain depth.

Montana.— In all shafts one hundred and fifty feet deep. Rev. Pol. Code 1895, §§ 3650–54.

Nevada.— In all shafts four hundred and fifty feet deep. Act July 1, 1879; Comp. Laws 1900, §§ 277–79.

South Dakota.— In all shafts two hundred feet deep. Laws 1897, p. 247.

Utah.— In all shafts two hundred feet deep. Laws 1901, p. 151.

Washington.— In all shafts one hundred and fifty feet deep. Hill's Ann. Codes and Stats., vol. 1, § 2269.

See generally, statutes cited *ante*, this subd. 8, p. 1371.

d. Regulating the storage of explosives.

Missouri.— Requires all explosives, except those necessary for immediate use, to be kept in a strong box under lock. Shots to be fired by an electric battery from the surface. R. S. 1899, §§ 8826, 8826*a*, as amended by Act March 27, 1901.

Montana.— Not more than three thousand pounds of any kind to be stored in a mine at one time. Rev. Pol. Code 1895, § 708.

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Pennsylvania.— *Anthracite mines.*— Storage of powder or other explosives in mines forbidden; persons having gunpowder or other explosives in a mine shall keep the same in a strong metallic box; no steel-pointed needle to be used in charging holes. Act June 2, 1891. §§ 26–36.

Bituminous mines.— Powder or explosives of any kind not to be taken into any mine in quantities greater than necessary for use on one shift; not more than twenty-five pounds to be stored in any tipple or weighing house where workmen have business to visit. Act March 15, 1893, §§ 45, 50.

e. Requiring miners to be brought to the surface for meals.

Missouri.— R. S. 1899, § 8795.

f. Relating to damages to shafts by live stock.

New Mexico.—Owners of live stock doing damage to shafts only liable for actual damages. Comp. Laws 1897, § 2314.

g. Protection against injury from unused shafts and openings.

Montana.— Shafts within one mile of the corporate limits of a city, or within three hundred feet of a public road or street, must be fenced; failure is a misdemeanor. Laws 1899, p. 149, amending § 704, Penal Code 1895.

Nevada.— All shafts and holes must be securely fenced or covered, under penalty of fine not exceeding one hundred dollars. Comp. Laws 1900, §§ 271–75.

North Dakota.—Shafts and holes not in use must be filled with rock and dirt or covered with two-inch plank. Laws 1899, p. 55.

Ohio.—All wells driven for oil or gas through a coal seam of another must be tightly plugged with wooden plugs covered with cement, under penalty of one hundred dollars fine. Act April 23, 1898, §§ 4–6.

Pennsylvania.— (Anthracite.) Act June 2, 1891, art. IV, §§ 6–8. (Bituminous.) Act May 15, 1893, art. XX, § 1, rule 56.

Utah.— Fence at least four feet high. R. S. 1898, § 1538.

Washington.— All shafts must be fenced; failure renders owner liable for all injuries by reason thereof. Hill's Ann. Code and Stats., vol. 1, §§ 2263–71.

West Virginia.— All unused workings must be carefully protected. Acts 1901, ch. 106, § 10.

Wyoming.— Shafts must be protected; failure same as Washington. R. S. 1899, § 2543.

h. Providing for a uniform system of bell signals.

California.— Act March 8, 1893, Laws 1893, p. 82.

Colorado.— See Laws 1893, p. 347.

Missouri.— R. S. 1899, § 8811, as amended by Act March 27, 1901.

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Oregon.— Laws 1901, p. 151.

Pennsylvania.— (Anthracite.) Act June 2, 1891, art. V, § 7.

West Virginia.— Acts 1901, ch. 106, § 11.

i. Medical attendance for smelter employees.

New Mexico.— Requires operators of smeltors to provide employees who become sick by reason of lead poisoning contracted while in the employ of such operator with the necessary medical attendance during such disability. Comp. Laws 1897, §§ 2337, 2338.

j. Providing against gases in smelters.

South Dakota.— Laws 1897, pp. 247, 248.

k. Fire protection in mines.

Utah.— Act March 25, 1901, Laws 1901, p. 150.

10. Relating to mining corporations.

California.— General provisions relating to property of mining corporations and the rights of stockholders in connection therewith. Laws 1901, pp. 332, 377–379, adding new sections to Civil Code numbered 584 to 590.

Colorado.— Requiring all mining corporations to file annual statements showing the number and location of their mining claims, the nature of their title and the improvements thereon. Laws 1901, pp. 116, 121, 122–124.

Michigan.— Special chapter similar in all respects to general law of corporations. Comp. Laws 1897, §§ 6991–7036.

Montana.— Relating to the disposition, by sale, lease or mortgage, of corporate property by directors, upon petition of stockholders. Laws 1899, p. 113.

Nevada.— Empowering corporations and associations for mining to sue individual members who are delinquent in paying assessments. Act December 19, 1862; Comp. Laws 1900, §§ 255–259.

Enabling mining corporations to consolidate, and defining the manner of consolidation. Act February 26, 1883; Comp. Laws 1900, §§ 260–262.

Permitting certain corporations to purchase and hold mining property. Act March 3, 1866; Comp. Laws 1900, §§ 253, 254.

Permitting certain co-owners to sue others for portion of expenses incurred in operating joint property. Act March 7, 1865; Comp. Laws 1900, §§ 263–270.

NOTE.— This last provision has never, so far as we are able to learn, received construction by the Nevada courts, for the reason, doubtless, that no one ever had the hardihood to rely on it.

New Mexico.— Permitting stockholders in mining corporations to have access to the books and property of the corporation for the purpose of making an examination. Comp. Laws 1897, §§ 2306–2308.

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Tennessee.— General provisions relative to mining corporations. R. S. 1884, §§ 1851–1874.

West Virginia.— Limiting the amount of land which may be held by a mining corporation. R. S. 1899, p. 555.

11. Relating to minerals, including oil and gas, in state lands.

(See also *ante*, this Appendix, §§ 76, 77, pp. 1347, 1348.)

Washington.— Duty of county commissioners, upon receiving petition of twenty taxpayers, each paying taxes on at least fifteen hundred dollars' worth of property, to cause wells to be sunk on lands owned by the county, to develop salt, coal, oil and gas. Hills' Ann. Codes and Stats., §§ 2246–2262.

Wisconsin.— Provides that any citizen may enter into a contract with the state for the purchase of state lands, and such person may enter into possession before the purchase price is paid, but that until the full payment of the purchase price, and the issuance of patent, all minerals in such lands remain the property of the state, and may not be removed, except with the express consent of the state board of land commissioners. R. S. 1898, § 220, p. 278. Then follows this provision:

Any person, his heirs or assigns who shall receive a patent pursuant to law for any public lands shall thereby acquire the right to all . . . mineral and other materials . . . dug, taken or removed therefrom before the issuance of such patent unless the same shall have been . . . dug or taken by the assent of said commissioners or sold by the state, and may maintain any proper action for the recovery thereof, or for any injury done to or trespass committed upon said lands before said patent shall have been issued, in the same manner and with the same effect, and he shall be entitled to like damages as if such injury or trespass has been committed after the patent had issued. Id., § 222, p. 279.

See also *post*, this subd., 24, *h*, p. 1380.

12. Relating to the establishment of State Bureau of Mines.

California.— Act April 16, 1880, Laws 1880, p. 115, as amended by Act March 21, 1885, Laws 1885, p. 217; Deering's Ann. Code, vol. V, pp. 636, 638.

Colorado.— Laws 1899, pp. 277–294.

Missouri.— R. S. 1899, §§ 8817, 8818, as amended by Act March 27, 1901.

New Mexico.— Memorial to congress for appropriation. Joint Memorial IX, 33d Legislative Assembly, approved March 16, 1899.

Ohio.— Providing for the establishment of a school of mines by the board of trustees of the state univesrity. Bates' Ann. Stats. 1902, §§ 4105–26–28.

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13. Relating to mining property not capable of partition.

Colorado.— Mills' Ann. Stats., § 3346, as amended by Laws 1893, p. 358.
Nevada.— Comp. Laws 1900, § 3407.

14. Relating to the disposition of tailings, and requiring every person to keep the same upon his own property.

Colorado.— Mills' Ann. Stats., § 3144.

15. Undertaking to define the rights of aliens.

Colorado.— Permits non-resident aliens, corporations or syndicates to acquire title to, and possess and work any of the mines in the state, to the same extent as citizens or residents of the United States, or this state. Mills' Ann. Stats., § 103.

Idaho.— Permits any person, natural or artificial, citizen or alien, except Mongolians born out of the United States, to own, hold and dispose of mining property. Civ. Code 1901, sec. 2565.

Unlawful for any person, or public or private corporation, to give employment to any alien, who, prior to the date of such employment, has failed, neglected or refused to become a citizen or declare his intention. Penal Code 1901, § 4857.

NOTE.— Whatever other merit these Idaho provisions may possess, they can certainly claim nothing for consistency.

16. Assuming to grant certain privileges to Indians.

Washington.— Permits any Indian to whom any kind of real estate has been allotted by the government to sell or in any manner dispose of the same with the consent of congress. Laws 1899, p. 155.

NOTE.— Except that this statute manifests a willingness on the part of its framers to permit congress and the Indians to manage their own affairs, it is of very little if any value, and the purpose of its enactment is not quite clear.

17. Exempting soldiers' claims from forfeiture.

Colorado.— Provides that mining claims taken up and recorded by persons who have since enlisted in the regular army, or the volunteer forces of the state, shall not be liable to forfeiture for non-performance of assessment work for two years thereafter. Mills' Ann. Stats., § 3146.

NOTE.— This is a matter concerning which congress has exclusive authority, and, therefore, any enactment upon the subject by a state legislature would be void for want of power. See text, §§ 112, 113.

18. Mining claims not affected by town-site patents.

Montana.— Mining claims properly located are not affected by town-site patents until the abandonment of the mining claim. Rev. Pol. Code 1895, § 5112.

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19. Defining fixtures.

Montana.— All tools, machinery and surface improvements placed upon the surface of mining claims are deemed fixtures. Rev. Civ. Code 1895, § 1077.

20. Relating to co-tenants.

Montana.— Permits one or more co-tenants to sue other co-tenants for damages to mining property in the same manner as if no co-tenancy existed. Laws 1899, p. 134, amending Code Civ. Proc. 1895, § 592.

See text, § 1460.

21. Requiring smelters to keep correct books. (See also *post*, this subd. 24, *c*, p. 1380.)

Colorado.— Requires all smelters and handlers of ore to keep a correct system of books showing correct accounts of all ores received and treated for people other than the owners of such smelter or reduction works. Mills' Ann. Stats. §§ 3227-3234.

New Mexico.— Comp. Laws 1897, §§ 2318-20.

Wisconsin.— R. S. 1898, §§ 1656-57.

22. Making it the duty of certain officers to furnish legislature with statistics relating to the output of mines, and the general system of operating them. It is the duty of all mine owners to furnish the commissioner of agriculture and labor the necessary information for this purpose upon demand, accompanied by necessary blanks.

North Dakota.— R. S. 1899, §§ 124-25.

23. Relating to the formation of mining districts.

Wyoming.— R. S. 1899, § 2533. See also Utah note, *ante*, § 8, pp. 1289-1292.

24. Penal provisions.

a. Penalty for destroying or tearing down location notices or boundary marks.

Arizona.— R. S. 1901, § 548.

Colorado.— Mill's Ann. Stats., § 3171.

Idaho.— Penal Code 1901, sec. 5096.

Montana.— Rev. Penal Code 1895, § 1062.

New Mexico.— Comp. Laws 1897, § 2302. See also § 2311. Fraudulently relocating mining claim is a misdemeanor. Id., § 2312.

Oregon.— Laws 1901, p. 175.

Pennsylvania.— Misdemeanor to wilfully deface or tear down any notice board, danger signal, special rules or laws, or to tamper with

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any electric or signal wires. Act May 15, 1893 (bituminous law). Art. XIX, § 1, rules 48, 51.

Misdemeanor to remove or render useless any fencing, signaling apparatus or similar instruments, or to tear down any rules which have been posted up by employers. Act June 2, 1891 (anthracite law). Art. XII, rules 25, 54.

Utah.— R. S. 1898, § 1535.

Washington.— Laws 1897, p. 231.

Wyoming.— R. S. 1899, § 2541.

b. Penalty for "salting."

Colorado.— Placing false specimens in mines, or falsely representing that samples were taken therefrom which were not, is a felony. Mills' Ann. Stats., § 1391.

Utah.— R. S. 1898, §§ 4399–4401.

Washington.— Act February 27, 1890, Hill's Ann. Codes and Stats., vol. II, § 238.

Wyoming.— R. S. 1899, § 2542.

c. Penalty for false bookkeeping by smelters and reduction works.

Colorado.— Mills' Ann. Stats., §§ 3227–3234.

New Mexico.— Comp. Laws 1897, §§ 2321–2325.

Wisconsin.— R. S. 1898, § 1657.

d. Counterfeit gold dust — False scales for weighing gold dust.

Colorado.— Mills' Ann. Stats., §§ 1262, 1380.

e. Conspiracy and force to gain possession of mining property.

North Dakota.— R. S. 1899, §§ 7662, 7683.

Wyoming.— R. S. 1899, § 2540.

f. Penalty for failure to deliver product of custom mill to proper owner.

Colorado.— Mills' Ann. Stats., § 1331.

g. Penalty for attempt to rob quartz mills, flumes or sluice boxes.

Washington.— Hill's Ann. Codes and Stats., vol. II, § 238, Penal Code.

h. Penalty for robbing mines, attempting to steal ore, or purchasing ore known to have been stolen.

ew Mexico.— Comp. Laws 1897, §§ 2316, 2317.

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Wisconsin.— R. S. 1898, § 4441, p. 2702.

Commissioner of public lands has power to seize or cause to be seized, without process, any minerals taken from the public lands. Id., § 240.

i. Penalty for blackmailing mining property.

New Mexico.— Comp. Laws 1897, § 2326.

j. General provisions relating to the operation of coal mines, and prescribing a penalty for violation of certain rules and regulations in connection therewith.

(See also this subd. 9, *a*, *b*; also 8, *b*, *ante*, p. 1380.)

Missouri.— For failure to provide escapement shafts. R. S. 1899, § 8800. See also §§ 8806, 8808, 8821, 8824.

Ohio.— See generally, R. S., §§ 4377, 6871.

Pennsylvania.— Act May 15, 1893, art. XX (bituminous act); Act June 2, 1891, art. XII (anthracite act).

West Virginia.— Acts 1887, ch. 50, § 6; Acts 1890, ch. 9, § 14.

§ 25. New Mexico provision permitting owner of patented lands to make rules.— The owner or owners of lands within this territory, the title to which has been vested by letters patent from the United States government, may make and file in the office of the county clerk of the county in which such lands are situated, such rules and regulations, not inconsistent with the laws of the United States and this territory as they may see fit, governing the location and acquisition of mining claims thereon, which rules and regulations when so filed, shall be binding upon all parties, and a copy thereof duly certified by the county recorder shall be received and admitted as evidence in any suit or proceedings relating to such mining claims; such rules and regulations may be changed and supplemented from time to time by other rules and regulations filed in like manner, providing that such change does not affect rights acquired thereto. Comp. Laws 1897, § 2314.

Miners' rules as evidence generally, see *ante*, this subd. 4, *a*, pp. 1368, 1369.

NOTE.— This statute undoubtedly has reference to mineral lands embraced within what are commonly designated as "Mexican grants" or "Spanish grants." The object of it, however, is not quite clear. After the title to property has passed to the patentee he would ordinarily be entitled to handle and dispose of it in any lawful manner, and this privilege is the most that this statute gives him, if, indeed, it does that,

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APPENDIX C.

FORMS IN PATENT PROCEEDINGS.

I. Lode and Placer Applications.

a. Land office papers.

1. Application to United States surveyor-general for survey of mining claim.
2. Notice of application for a United States patent.
3. Proof of posting notice on the claim.
4. Application for patent.
   a. Affidavit that placer contains no known lode.
   b. Affidavit showing why placer claim does not conform to public survey.
5. Affidavit of citizenship.
6. Agreement of publisher.
7. Notice for publication.
8. Proof of publication.
9. Proof that plat and notice remained posted on claim during time of publication.
10. Notice by register that adverse claim has been filed.
11. Protest and adverse claim.
12. Statement of fees and charges.
13. Application to purchase.
14. Receiver's receipt.
15. Register's final certificate of entry.

b. Papers in court,

1. Complaint.
2. Answer.
3. Stipulation.
4. Findings.
5. Decree.

II. Coal Land Forms.

a. Declaratory statement, and accompanying papers, under preference right.

1. Declaration of intention to purchase coal land.
2. Special power of attorney.
3. Non-mineral affidavit — By attorney.
4. Non-mineral affidavit — By two witnesses.
5. Final application to purchase.

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II. Coal Land Forms — con.
b. Cash or private entry.
1. Application to purchase.
2. Non-mineral affidavit.
3. Final application to purchase.

Author's Note.— The forms under the first head of this Appendix are taken from the papers actually used in an application for patent in the Salt Lake Land Office, in which an adverse claim was filed within the statutory time, followed by a suit in the state court within thirty days thereafter. This suit was compromised in favor of the defendant, the original applicant, and findings and decree entered accordingly, after which the applicant proceeded to patent his claim. Because the pleadings in adverse suits differ in many respects from those used in any other action, we have deemed advisable to incorporate those used in this suit, which are the usual forms, in this Appendix.

It has not been our intention to include here any papers except those the attorney is obliged to prepare, or which come directly to him from the land office. A complete list of the other papers necessary for use in an application for patent is given in the text.[1]

The coal land forms are those adopted and approved by the general land office.

[1] See *ante*, text, §§ 655, 663.

I. Lode and Placer Application.

a. Land Office Papers.

(1) *Application to United States Surveyor-General for Survey of Mining Claim.*

Salt Lake City, Utah, January 17, 1900.

U. S. Surveyor General,
Salt Lake City, Utah.

Sir:— Thomas Pells, claimant, hereby makes application for an official survey, under the provisions of Chapter six, Title thirty-two, of the Revised Statutes of the United States, and regulations and instructions thereunder, of the

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mining claim known as the "Rough Wrestler," situate in West Mountain Mining District, Salt Lake County, State of Utah, in Sections 35 and 2, Townships Nos. 3 and 4 S., Range No. 3 W. of Salt Lake Meridian. Said claim is based upon a valid location made on January 2nd, 1886, and duly recorded on January 3rd, 1886, and is fully described in the duly certified copy of the record of the location notice, filed herewith. Said location notice contains the names of the locators, the date of location, and such a definite description of the claim by reference to natural objects or permanent monuments as will identify the claim. and said location has been distinctly marked by monuments on the ground, so that its boundaries can be readily traced.

I request that you will send me an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that I may make proper deposit therefor, and that thereupon you will cause the survey to be made by F. M. Lyman, U. S. Deputy Mineral Surveyor, and proper action to be taken thereon by your office, as required by the U. S. mining laws and regulations thereunder.

THOMAS PELLS,
Claimant.

WESTERVELT & SNYDER,
Attorneys for Claimant,
P. O. Address, Atlas Block,
Salt Lake City, Utah.

(2) *Notice of Application for a United States Patent.*

IN THE UNITED STATES LAND OFFICE, Salt Lake City, Utah. } ss.

Notice is hereby given that in pursuance of the Act of Congress, approved May 10, 1872, "To promote the development of the mining resources of the United States," Thomas Pells, claiming one thousand and fifty-four 1-10 (1054.1) linear feet of the "Rough Wrestler" vein, lode or mineral deposit, bearing gold, silver, lead, copper and other valuable minerals, with surface ground 218½ (average) feet in width, lying, being and situate in West Mountain Mining District, County of Salt Lake and State of Utah, has made application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted, and by the field-notes of survey thereof, now filed in the office of the Register of the District, of lands subject to sale at Salt

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Lake City, Utah, which field-notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at 16 degrees, 30 minutes East, as follows, to wit:

Commencing at post No. 1, a corner of the claim, and running thence south 65 deg. 19 min. east 230 feet to post 2, thence north 33 deg. 37 min. east 1050.6 feet to post 3, thence north 65 deg. 19 min. west 207 feet to post 4, thence south 34 deg. 51 min. west 1054.4 feet to post 1, place of beginning; from post No. 1 of said claim southwest corner of section 35, township 3 south, range 3 west of Salt Lake meridian, bears north 54 deg. 58 min. west 1139.2 feet; excluding, however, from said described area, the following area in conflict with the Black Hawk lode (U. S. lot 57), to wit: Beginning at a point on the east side line of the Rough Wrestler north 59 deg. east 59.7 feet from corner 2 of Black Hawk, thence north 33 deg. 37 min. west 460.9 feet along east side line of Rough Wrestler to post 3 thereof, thence north 65 deg. 19 min. west 3 feet along end line of Black Hawk, thence south 59 degrees west 474.5 feet along side line of Black Hawk to post 3 thereof, thence south 31 deg. west 200 feet along end line of Black Hawk to corner 2 thereof, thence north 59 deg. east along side line of Black Hawk 59.7 feet to beginning, containing 1.242 acres; also excluding the following area in conflict with the Spanish lode (U. S. lot 58), to wit: Beginning at a point on north end line of Rough Wrestler north 65 deg. 19 min. west from post 3 thereof 21.4 feet, thence north 65 deg. 19 min. west along north end line of Rough Wrestler 75.4 feet, thence south 31 deg. east along end line of Spanish 62.3 feet, thence north 59 deg. east along side line of Spanish 42.6 feet to beginning, containing 0.03 acres; also excluding the following area in conflict with the Buckeye lode (U. S. lot 88), to wit: Beginning at post 4 of Rough Wrestler, thence south 34 deg. 51 min. west 75.4 feet along west side line of Rough Wrestler, thence north 37 deg. 30 min. east 88.3 feet along side line of Buckeye, thence north 65 deg. 19 min. west 34.6 feet along north end line of Rough Wrestler to beginning, containing 0.029 acres.

The total net area of the Rough Wrestler for which patent is applied, exclusive of said areas in conflict, is 3.905 acres.

The said mining claim being of record in the office of the Recorder of said West Mountain Mining District, in Book O, Page 39, at Bingham, in the County and State aforesaid,

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the presumed general course of the said Rough Wrestler vein, lode or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments, this claim being for 1054.1 linear feet thereof, together with the surface ground shown upon the official plat posted herewith. The nearest known locations being the Black Hawk lode, U. S. lot 57; Spanish lode, U. S. lot 58; Buckeye lode, U. S. lot 88; Sanders, U. S. lot 375; northeasterly half of Beebe, U. S. lot 147, and Bully Boy, U. S. lot 84. The said Rough Wrestler claim being designated as lot 3934 in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted and applied for, are hereby notified that unless their adverse claims are duly filed as according to law, and the regulations thereunder, within sixty days from date hereof, with the Register of the U. S. Land Office at Salt Lake City, in the County of Salt Lake, State of Utah, they will be barred, in virtue of the provisions of said statute. THOMAS PELLS.

Dated on the Ground, this 21st day of March, A. D. 1900.

Witness:

JAS. R. TANISH.
GEORGE WELLS.

(3) *Proof of Posting Notice and Diagram on the Claim.*

STATE OF UTAH, } ss.
County of Salt Lake. }

Jas. R. Tanish and George Wells, each for himself and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the 17th day of March, A. D. 1900, when a plat representing the Rough Wrestler, and certified to as correct by the U. S. Surveyor General of Utah, together with a notice of the intention of Thomas Pells to apply for a patent for the Mining Claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit: Upon a pine post 4 feet high, 4 inches in diameter, at the point of the discovery of said Rough Wrestler, where the same could be easily seen and examined; the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

(Copy of notice as posted, followed by signatures of affiants, and same jurat as that at the end of (4), *post*, p. 1389.)

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(4) *Application for Patent.*

STATE OF UTAH, }
County of Salt Lake. } ss.

APPLICATION FOR UNITED STATES PATENT FOR THE ROUGH WRESTLER LODE MINING CLAIM.

To the Register and Receiver of the United States Land Office, Salt Lake City, Utah:

Thomas Pells being first duly sworn, according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and that in virtue of a compliance with the mining laws of the United States and State of Utah, and the rules, regulations and customs of the West Mountain Mining District, by the said Thomas Pells, he has become the owner of and is in the actual, quiet and undisturbed possession of the said Rough Wrestler vein, lode or deposit, bearing gold, silver, lead and other valuable minerals, being 1054.1 linear feet in length, together with surface ground, as shown upon the official plat filed herewith; lying, being and situate in West Mountain Mining District, Salt Lake County, Utah, and designated by the surveyor of Utah as U. S. M. S. No. 3934 of the official surveys of and within said district, and being more particularly set forth and described in the official field notes of the survey thereof, filed herewith and made a part hereof, and marked "Exhibit A," approved the 17th day of March, 1900, and in the official plat of said survey now posted conspicuously upon said claim, a copy of which is filed herewith and made a part hereof and marked "Exhibit B."

Deponent further states that the facts relative to the right of possession of the applicant hereinbefore named, to said mining claim and premises, so surveyed and platted, are substantially as follows, to wit:

That on the 2nd day of January, A. D. 1886, the premises known as the Rough Wrestler Lode Location or Mining Claim, and which is more fully described in the plat and field notes thereof, filed herewith, were a portion of the vacant and unoccupied mineral lands of the public domain, and were not held, occupied or claimed by any person or persons as mining ground or otherwise. That the locators thereof, citizens of the United States (or who had declared their intention to become such), entered upon and explored said premises and discovered therein a vein of ore bearing gold, silver, lead and other valuable minerals, and there

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and then located the same as a mining claim, and called the same the Rough Wrestler Lode. A certified copy of the notice of location thereof is filed herewith and made a part hereof and marked "Exhibit C."

And on the same day the same locators placed thereon a copy of said notice on a monument erected at or near the discovery point thereof, and after doing and performing all the acts required by the local laws, rules and regulations of the said mining district, caused the said notice to be duly filed and recorded in the Recorder's office of said mining district as appears by the copy of said location notice filed herewith.

Affiant further says that after the date of location of the said lode location or mining claim, to wit: On and after the date aforesaid of said location, the locators thereof and their subsequent grantees, remained continuously in possession of the same, working, mining and extracting ore therefrom, all work having been performed within the time required by the local laws of the said mining district and the laws of the United States relating to mines. That the said location or mining claim was and is now duly marked and defined upon the ground, as fully described in the plat and field notes thereof, filed herewith and hereinbefore referred to.

The right of title, as shown by the abstract of title filed herewith and made a part hereof, and marked "Exhibit D," is now in Thomas Pells, for the confirmation of which a patent is hereby applied for from the United States.

Said claim is particularly described with magnetic variation at 16 degrees 30 minutes east, as follows, to wit: (Same description as in notice of application for patent, (2), p. 1385, *ante*.)

Claimant has done and placed for and on his said location, one hundred dollars' worth of labor and improvements during the year 1899. The nearest known locations are the Black Hawk lode, U. S. lot 57; Spanish lode, U. S. lot 58; Buckeye lode, U. S. lot 88; Sanders, U. S. lot 375; northeasterly half of Beebe, U. S. lot 147, and Bully Boy, U. S. lot 84.

A duly certified copy of the By-Laws of said mining district is on file with the application for patent for the Rough Wrestler Lode Mining Claim, M. E. No. 3083. The value of the labor done and improvements made upon said claim by claimant and his grantors, being equal to the sum of five hundred dollars in gold coin of the United States. In consideration of which facts, and in conformity with the provisions of the Act of Congress, approved May 10, 1872,

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entitled "An Act to promote the development of the mining resources of the United States," application is hereby made for and in behalf of said Thomas Pells, for a patent from the government of the United States for the said Rough Wrestler Mining Claim, the vein, lode, deposit and the surface ground so officially surveyed and platted.

THOMAS PELLS.

Subscribed and sworn to before me this 29th day of May, A. D. 1900, and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit to which was attached the field notes of survey of the Rough Wrestler Mining Claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

GEORGE WESTERVELT,
Notary Public Salt Lake County, Utah.

WESTERVELT & SNYDER,
Attorneys for Applicant,
Salt Lake City, Utah.

Where the application is for a placer claim, the application for patent should be supplemented by a corroborative affidavit substantially in the form of (a), *infra*. And where the location does not conform to the public survey, an affidavit substantially in the form of (b) should also accompany the application.

If the application is for saline lands, under the act of congress permitting entry thereof as placer, insert before the last paragraph the following:

"Applicant further says that he has never, either as an individual or as a member of an association, located or entered any other lands under the provisions of the laws of the United States relating to the location and entry of saline lands."

(a) *Affidavit that Placer Contains No Known Lode.*

(Venue.)

S. M. Levy and M. D. Murphy, each for himself and not one for the other, being first duly sworn, says that he is a citizen of the United States, over the age of twenty-one years; that he is familiar with the land embraced within the surface boundaries of the Mascotte No. 1 and Mascotte No. 2 placer mining claims, situated in West Mountain Mining District, Salt Lake County, Utah, and has been

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familar with said land for upwards of three years last past; that there is no lode known to exist, so far as affiant's knowledge and information serves, within the limits of said claims, or either of them; and that, to affiant's best knowledge, information and belief, no lode exists within the limits thereof.

(Jurat.) S. M. LEVY.
M. D. MURPHY.

(b) *Affidavit Showing why Placer Claim Does Not Conform to Public Survey.*

(Venue.)

S. M. Levy and M. D. Murphy, each for himself, being first duly sworn, says, that he is familiar with the land embraced within the limits of the Mascotte No. 1 and Mascotte No. 2 placer mining claims in West Mountain Mining District, Salt Lake County, Utah; that it was proper to locate said claims in the manner they were located in order to cover the alluvial drift therein, for the following reasons:

That at the westerly end of said claims the canyon in which they are located becomes narrow, and the alluvial deposits therein, which said claims were located to cover, become narrow at the westerly end of said claims and widen out toward the easterly end thereof; that if said claims had been located according to legal subdivisions, a large quantity of land would have been embraced within the limits thereof, which would be entirely unfit for placer mining purposes. That in order to cover the alluvial deposits sought to be located, it would have been impracticable to locate said claims in any other manner than that in which they were located.

(Jurat.) S. M. LEVY.
M. D. MURPHY.

(5) *Affidavit of Citizenship.*

STATE OF UTAH, }
County of Salt Lake, } ss.

Thomas Pells being first duly sworn according to law, deposes and says, that he is the applicant for patent for "Rough Wrestler" Mining Claim, situated in West Mountain Mining District, County of Salt Lake, that he is a naturalized citizen of the United States, born in Litchfield, County of Stafford, England, in the year 1839, and is now a resident of Bingham, Salt Lake County, State of Utah; that he was admitted to citizenship of the United States by the Third District Court of the Territory of Utah, on September 16th, 1885.

(Jurat.) THOMAS PELLS.

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(6) *Agreement of Publisher.*

The undersigned, publisher and proprietor of the Bingham Bulletin, a weekly newspaper published at Bingham, County of Salt Lake and State of Utah, does hereby agree to publish a notice, dated United States Land Office, No. 3083, Salt Lake City, Utah, June 2, 1900, required by Chapter Six of Title Thirty-two, Revised Statutes of the United States, of the intention of Thomas Pells to apply for a patent for his claim on the Rough Wrestler lode, situated in West Mountain Mining District, County of Salt Lake and State of Utah, and hold the said Thomas Pells alone responsible for the amount due for publishing the same. And it is hereby expressly stipulated and agreed that no claim shall be made against the Government of the United States, or its officers or agents, for such publication.

Witness my hand this 3rd day of June, A. D. 1900.

G. B. GRAHAM.

(7) *Notice for Publication.*

Notice No. 3083.

APPLICATION FOR PATENT.

UNITED STATES LAND OFFICE,
Salt Lake City, Utah, June 2, 1900.

Notice is hereby given that Thomas Pells has made application for a United States patent for the Rough Wrestler mining claim, situate in West Mountain mining district, Salt Lake county, Utah, consisting of one thousand and fifty-four 1-10 (1054.1) linear feet of the vein, lode or deposit, bearing gold, silver, lead and other valuable minerals, and surface ground 218½ (average) feet wide, being lot No. 3934, and described in the field notes and plat of the official survey on file in this office, with magnetic variation at 16 deg. 30 min. east, as follows: (Description of the Rough Wrestler, excluding conflict areas, as described in papers (2), (3) and (4).)

I direct that this notice be published in the Bingham Bulletin, at Bingham, Salt Lake county, Utah, the newspaper published nearest the said mining claim, for the period of sixty days.

FRANK D. HOBBS, Register.

WESTERVELT & SNYDER,
Claimant's Attorneys.

First publication June 8; last, Aug. 3, 1900.

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(8) *Proof of Publication.*

STATE OF UTAH, } ss.
County of Salt Lake. }

(Copy of printed notice pasted on.)

I, G. B. Graham, being first duly sworn, depose and say that I am the editor and proprietor of the Bingham Bulletin, a weekly newspaper of general circulation published every Friday at Bingham, Salt Lake County, Utah; that the notice (attached hereto) of the intention of Thomas Pells to apply for a patent for the Rough Wrestler lode, was published in said newspaper for nine consecutive weeks, the first publication having been made on the 8th day of June, 1900, and the last on the 3rd day of August, 1900; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and the same was published in the newspaper proper and not in a supplement.

(Jurat.) G. B. GRAHAM.

(9) *Proof that Plat and Notice Remained Posted on Claim During Time of Publication.*

STATE OF UTAH, } ss.
County of Salt Lake. }

Thomas Pells, being first duly sworn according to law, deposes and says that he is claimant in the Rough Wrestler Mining Claim in West Mountain Mining District, Salt Lake County, State of Utah, the official plat of which premises, together with the notice of intention to apply for a patent therefor, was posted thereon, on the 21st day of March, A. D. 1900, as fully set forth and described in the affidavit of Jas. R. Tanish and George Wells, dated the 23rd day of March, A. D. 1900, which affidavit was duly filed in the office of the Register, at Salt Lake City, Utah, in this case; and that the plat and notice so mentioned and described, remained continuously and conspicuously posted upon said Mining Claim from the 21st day of March, A. D. 1900, until and including the 3rd day of December, A. D. 1900, including the sixty days' period which notice of said application for patent was published in the newspaper.

THOMAS PELLS.

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Subscribed and sworn to before me, this 5th day of December, A. D. 1900, and I hereby certify that the foregoing affidavit was read to the said Thomas Pells previous to his name being subscribed thereto; and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

GEORGE WESTERVELT,
Notary Public.

(Seal.)

(10) *Notice by Register that Adverse Claim has been Filed.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Salt Lake City, July 31, 1900.

Westervelt & Snyder, Attorneys for Thomas Pells, Salt Lake City:

SIRS:— You are advised that on July 31, 1900, there was filed in this office, during the statutory period provided therefor, the adverse claim of U. S. Mining Company, for Alice claim, against the issuing of patent to Thomas Pells, for Rough Wrestler mining claim.

Now, therefore, under section 2326, Revised Statutes of the United States, and paragraph 85 of the regulations thereunder, approved June 24, 1899, "the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits."

Very respectfully,
FRANK D. HOBBS,
Register.

(Same notice was given that adverse had been filed for Sanders No. 2.)

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(11) *Protest and Adverse Claim.*

UNITED STATES LAND OFFICE, STATE OF UTAH, Salt Lake City. } ss.

In the matter of application of Thomas Pells for a United State patent for the Rough Wrestler lode or mining claim, and the land and premises appertaining to said mine, situated in the West Mountain Mining District, in Salt Lake County, State of Utah.

To the Register and Receiver of the United States Land Office at Salt Lake City, and to the Above-named Applicant for Patent for the Rough Wrestler Lode:

You are hereby notified that United States Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maine, by its duly appointed and authorized agent and attorney, W. M. Bradley, the lawful owner, and entitled to the possession of one thousand and fifty (1050) feet of the said Rough Wrestler lode or mine described in said application, as shown by the diagram posted on said claim, and the copy thereof filed in the land office with said application, and as such owner, this contestant, the said United States Mining Company, does protest against the issuance of a patent thereon to said applicant, and does dispute and contest the right of said applicant therefor.

And this contestant does present the nature of its adverse claim, and does fully set forth the same in the affidavit hereto attached, marked "Exhibit A," and the further exhibits thereto attached, and made part of said affidavit.

The said United States Mining Company, by its said agent and attorney, W. M. Bradley, therefore respectfully asks the said Register and Receiver that all further proceedings in the matter be stayed until a final settlement and adjudication of the rights of this contestant can be had in a court of competent jurisdiction.

July 30th, 1900.

UNITED STATES MINING COMPANY,
By W. M. BRADLEY, its agent and attorney in fact.

Exhibit A.

STATE OF UTAH, County of Salt Lake. } ss.

W. M. Bradley, being first duly sworn, deposes and says, that he is a citizen of the United States, now residing in Salt Lake City, Utah; that he is the duly authorized agent

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and attorney of the contestant and protestant named in, and who subscribed the notice and protest hereto annexed. Affiant further says that the said contestant is the owner by purchase and in possession of the Alice lode or vein of quartz and other rock in place, bearing gold, silver, lead and other metals. That the said lode is situated in the West Mountain mining district, Salt Lake county, State of Utah.

This affiant further says, that on the day of location, the premises hereinafter described were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held or claimed by any person or persons as mining ground or otherwise, and that while the same were so vacant and unoccupied and unclaimed, to wit: on the 14th day of May, 1888, A. F. Holden, being a citizen of the United States, entered upon and explored the premises, discovered and located the said Alice lode and occupied the same as mining claims. That the said premises so located and appropriated consist of fifteen hundred (1500) feet in a northeasterly direction, and three hundred (300) feet in a southerly direction, as will fully appear by reference to the notice of location, a duly certified copy whereof is hereunto annexed, marked "Exhibit B," and hereby made a part of this affidavit.

That the locator of said lode caused said notice to be filed and recorded in the proper books of record in the Recorder's office in said district on the 15th day of May, 1888.

And affiant further says, that said locator, in all respects, complied with every custom, rule, regulation and requirement of the mining laws, and every rule and custom established and in force in said West Mountain mining district, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said mining claim and premises. And that said locator and his grantees, including this contestant, have continuously been, and that this contestant now is in possession of said premises, working and developing the same.

That, by chain of a mesne conveyances, the record title in and to said mining premises is now in this contestant, as will appear by reference to the abstract of title and paper hereto attached, marked "Exhibit D," and made a part of this affidavit. And this contestant is now in the actual, quiet and peaceable possession of all of said mining premises.

Affiant further says, the said Rough Wrestler lode, as shown by the notice and diagram posted on said claim, and the copy thereof filed in the United States Land Office at

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said Salt Lake City, with said application for a patent, crosses and overlies said Alice lode, and embraces about 1050 feet in length by about 160 feet in width of the said Alice lode, the property of this contestant, as fully appears by reference to the diagram or map duly certified by J. Fewson Smith, Jr., United States Deputy Surveyor, hereto attached, marked "Exhibit C," and which diagram presents a correct description of the relative location of the said Alice lode, and of the pretended Rough Wrestler lode.

Affiant further says, that he is informed and believes that said applicant for patent well knew that this contestant was the owner in possession and entitled to the possession of so much of said mining ground embraced within the survey and diagram of said application, as he hereinbefore stated, and this contestant is entitled to all the ores and minerals in said Alice lode, and all that may be contained within a space of one hundred and fifty (150) feet on each side of said Alice lode.

And affiant further says, that this protest is made in entire good faith, and with the sole object of protecting the legal rights and property of the contestant in the said Alice lode and premises. W. M. BRADLEY.

Subscribed and sworn to before me this 30th day of July, A. D. 1900. WM. PISCHEL,
(Seal.) Notary Public.

The same adverse claim, with Exhibit "A" attached, except as to description of conflict area, was filed for the Sanders No. 2 by the same adverse claimant.

Within thirty days from the filing of these adverse claims, suit was commenced upon each of them in the state court. The pleadings, findings and decree in one of these suits are given in full, *post*, this subhead, *b*, p. 1399.

(12) *Statement of Fees and Charges.*

STATE OF UTAH, }
County of Salt Lake. } ss.

Thomas Pells being first duly sworn according to law, deposes and says, that he is the applicant for patent for the "Rough Wrestler" lode in West Mountain Mining District,

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County of Salt Lake, State of Utah, under the provisions of Chapter six of Title thirty-two of the Revised Statutes of the United States, and that in the prosecution of said application he has paid out the following amounts, viz.:

To the credit of the Surveyor-General's Office, Fifty Dollars;
for surveying, Fifty Dollars;
for filing in the local Land Office, Ten Dollars;
for publication of notice, Twenty-five Dollars;
and for the land embraced in claim, Twenty Dollars.

(Jurat.) THOMAS PELLS.

(13) *Application to Purchase.*

To the Register and Receiver, United States Land Office at Salt Lake City, Utah:

The undersigned, claimant under the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, hereby applies to purchase that Mining Claim known as the Rough Wrestler, on Sections 35 and 2, in Township Nos. 3 and 4 South of Range No. 3 West of Salt Lake meridian, designated as Mineral Survey No. 3934, said Mineral Survey extending 1054.1 linear feet in length along said Rough Wrestler vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in mining claims or surveys designated as Lots Nos. 57, 58 and 88, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode mining claim embracing 3.905 acres in West Mountain Mining District, in the County of Salt Lake and State of Utah, as shown by the survey thereof, and hereby agrees to pay therefor Twenty Dollars, being the legal price thereof.

Dated April 7, 1901. THOMAS PELLS.

I, Frank D. Hobbs, Register of the Land Office at Salt Lake City, Utah, do hereby certify that the aforesaid Mining Claim or Mineral Survey No. 3934 as applied for above, is subject to entry by the above-named applicant; the area of said lode mining claim being 3.905 acres, and the legal price thereof Twenty Dollars.

April 7, 1901. FRANK D. HOBBS, Register.

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(In Duplicate.)

(14) *Receiver's Receipt.*

(Duplicate to be given the purchaser.)

Mineral Entry No. 3083. } UNITED STATES LAND OFFICE,
Mineral Survey No. 3934. } at Salt Lake City, Utah,
April 9, 1901.

Received from Thomas Pells the sum of Twenty and no-100 ($20.00) dollars, the same being payment in full for the area embraced in that Mining Claim known as the Rough Wrestler, Sections 35 and 2, in Townships Nos. 3 and 4 S. of Range No. 3 W. of Salt Lake meridian, designated as M. S. No. 3934, said M. S. No. 3934 extending one thousand and fifty-four 1-10 (1054.1) feet in length along said Rough Wrestler vein or lode, expressly excepting and excluding from this sale and entry all that portion of the ground embraced in mining claims or surveys designated as Lots Nos. 57, 58 and 88, known respectively as the Black Hawk, Spanish and Buckeye lode mining claims, patented, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode claim as entered embracing 3.905 acres, in the West Mountain Mining District, in the County of Salt Lake and State of Utah, as shown by the survey thereof.

$20.00. GEO. A. SMITH, Receiver.

(15) *Register's Final Certificate of Entry.*

Mineral Entry No. 3083. } UNITED STATES LAND OFFICE,
Mineral Survey No. 3964. } at Salt Lake City, Utah,
April 9, 1901.

It is hereby certified that in pursuance of the provision of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, Thomas Pells, whose P. O. Address is Bingham, Salt Lake County, Utah, on this day purchased that mining claim known as the Rough Wrestler lode mining claim, in sections 35 and 2, Townships Nos. 3 and 4 S. of Range No. 3 W. of Salt Lake meridian, designated as Mineral Survey No. 3934, said M. S. No. 3934 extending 1054.1 feet in length along said Rough Wrestler vein or lode, expressly excepting and excluding from said purchase all that portion of the ground embraced in mining claims or surveys desig-

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nated as Lot No. 57, Lot No. 58 and Lot No. 88 known respectively as the Black Hawk, Spanish and Buckeye lode claims, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode claim, as entered, embracing 3.905 acres in the West Mountain Mining District, County of Salt Lake and State of Utah, as shown by the plat and field-notes of survey thereof, for which the said party first above named has this day made payment to the Receiver in full, amounting to the sum of twenty dollars.

Now, therefore, be it known that upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field-notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said Thomas Pells if all be found regular. GEORGE A. SMITH, Receiver.

b. PAPERS IN COURT.

(1) *Complaint.*

In the District Court for the Third Judicial District of the State of Utah, in and for Salt Lake County.

UNITED STATES MINING COMPANY, a corporation, Plaintiff, vs. THOMAS PELLS, Defendant.	ADVERSE SUIT. Alice vs. Rough Wrestler, COMPLAINT.

The plaintiff above named complains of the above defendant and alleges and shows to the court:

1. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

2. That on the 14th day of May, 1888, the plaintiff's predecessors in interest were and the plaintiff and its grantors ever since have been the owners, and the plaintiff now is the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession, by virtue of the discovery of mineral thereon and location thereof made on said 14th day of May, 1888, of that certain mine and mining claim, containing a lode of rock in place bearing gold, silver, lead and other precious metals, situate in West Mountain Mining District, Salt Lake County and State of Utah, called the Alice Lode Mining Claim, and more particularly described as follows:

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Commencing at corner No. 1 of said Alice claim, and running thence north 28 deg. 00′ east 1500 feet to corner No. 2; thence south 62 deg. 00′ east 300 feet to corner No. 3; thence south 28 deg. 00′ west 1500 feet to corner No. 4; thence north 62 deg. 00′ west 300 feet to corner No. 1, the place of beginning.

From said corner No. 3, corner No. 4 of the Rough Wrestler claim bears south 52 deg. 53′ west 88.5 feet.

3. That since the location as aforesaid of said Alice Mining Claim, the plaintiff, with its predecessors and grantors, has done and performed not less than one hundred dollars' worth of labor and improvements in and upon said mining claim during each and every year for the development of said claim, and performed each and every act required by law for the purpose of holding said claim.

4. That the defendant, claiming to be the owner of an alleged adjacent mining claim, called the Rough Wrestler Mining Claim, on or about the 9th day of August, 1899, wrongfully caused said alleged Rough Wrestler Mining Claim to be so surveyed as to cross over and overlap the Alice Mining claim and lode, and include a portion thereof described as follows:

Commencing at corner No. 1 of said alleged Rough Wrestler claim, and running thence south 65 deg. 19 min. east 163.3 feet to the intersection of the southerly end line of said alleged Rough Wrestler claim with the easterly side line of said Alice claim; thence north 28 deg. 00 min. east 1039.6 feet to the intersection of the easterly side line of said Alice claim with the northerly end line of said alleged Rough Wrestler claim; thence north 65 deg. 19 min. west 37.3 feet to corner No. 4 of said alleged Rough Wrestler claim; and thence south along the westerly side line of said alleged Rough Wrestler claim 34 deg. 51 min. west 1054.4 feet to said corner No. 1 of said Rough Wrestler claim, the place of beginning, containing 2.39 acres.

5. That on or about the 2nd day of June, 1900, the defendant filed the field notes and a diagram of said survey of the alleged Rough Wrestler mining claim, and also an application for a United States patent for said mining claim, in the United States Land Office, at Salt Lake City, Utah, and caused the Register of said Land Office to give notice of said application for patent, by publication, as required by law.

6. That in and by said application for patent, the defendant wrongfully set up and alleged that he was the owner and in the possession of the whole of the alleged Rough

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Wrestler mining claim, inclusive of the premises last above described, and the lode therein, part of the Alice mining claim and lode, and the property, and in possession of the plaintiff.

7. That the plaintiff, on or about the 31st day of July, 1900, and during the sixty days' period of publication of the notice of application for patent for said alleged Rough Wrestler mining claim, filed in said Land Office under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form, and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application, in said Land Office, were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

8. That the defendant maintains and prosecutes said application for patent for the alleged Rough Wrestler mining claim, and thereby the title and possession of plaintiff in and to the last above-described premises, being the area thus brought in conflict between the Alice mining claim, and the alleged Rough Wrestler mining claim, are wrongfully impeached, clouded and incumbered, and the value of plaintiff's estate and property therein greatly depreciated.

9. And the plaintiff, on information and belief, alleges that if said alleged Rough Wrestler claim ever had any valid or legal existence the claimants thereof failed to do or perform or cause to be done or performed thereupon during or for the year 1887 the annual labor or assessment work or improvements required by law in order to avoid a forfeiture thereof, and thereby and because of such failure have forfeited the same and did not resume possession of or work upon the same prior to May 14th, 1888, when said last Alice lode mining claim was located.

The plaintiff therefore prays judgment and relief against the defendant:

That the plaintiff is the owner and lawfully in and entitled to the possession of the last above-described premises, the area in conflict between the Alice mining claim and the alleged Rough Wrestler mining claim, and the lode therein; and quieting and confirming plaintiff's title thereto and possession thereof.

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That the defendant has no title to or right of possession of said conflict area or the lode therein, or any part thereof.

That the defendant be restrained, pending the action, and upon trial perpetually, from entering in or on said conflict area or the lode therein, or any part thereof, or mining in, or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that plaintiff have all other and further proper relief, with costs of suit.

W. M. BRADLEY,
Plaintiff's Attorney.

(Duly verified.)

(2) *Answer.*

(*Title of Court and Cause.*)

Now comes the defendant in the above entitled action, and answering the complaint of plaintiff filed herein,

Admits the corporate character of plaintiff.

Admits that on or about the 9th day of August, 1899, the defendant caused the "Rough Wrestler" mining claim to be surveyed as alleged in the complaint, but denies that said survey was wrongful;

Admits that he filed the field notes and diagram of said survey and application for patent for said mining claim, and caused notice thereof to be published as alleged in the complaint;

Admits that he maintains and prosecutes said application for patent for said "Rough Wrestler" mining claim; and said defendant

Denies each and every allegation of said complaint not herein specifically admitted or qualified.

Further answering said complaint, this defendant alleges:

1. That he is and at all times herein mentioned was, a citizen of the United States.

2. That on and since the 2nd day of January, 1886, the defendant, with his predecessors and grantors, was, ever since has been and now is the owner (subject only to the paramount title of the United States) in the possession and entitled to the possession, by virtue of a discovery of mineral thereon, and valid location thereof according to law made on January 2nd, 1886, of that certain mining claim containing a lode or vein of rock in place bearing gold, silver and other valuable minerals, known as the "Rough Wrestler," situated in West Mountain Mining District, Salt Lake County, Utah, particularly described as follows, to wit:

Beginning at Post 1, a corner of the claim, and running

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thence S. 65 D. 19′ E. 230 feet to Post 2; thence N. 33 D. 37′ E. 1050.6 feet to Post 3; thence N. 65 D. 19′ W. 207 feet to Post 4; thence S. 34 D. 51′ W. 1054.4 feet to Post 1, place of beginning. From Post 1 of said claim the S. W. Cor. of Sec. 35, T. 3 S., R. 3 W., Salt Lake Meridian, bears N. 54 D. 38′ W. 1139.2 feet.

Excluding, however, from said described area, the following areas in conflict, to wit:

With Black Hawk Lode, U. S. Lot 57, beginning on E. side line of Rough Wrestler N. 59 D. E. 59.7 feet from Cor. 2 of Black Hawk, thence N. 33 D. 37′ E. 460.9 feet to Post 3 of Rough Wrestler; thence S. 59 D. W. 474.5 feet to Cor. 3 of Black Hawk; thence S. 31 D. W. 200 feet to Cor. 2 of Black Hawk; thence N. 59 D. E. 59.7 feet to beginning.

With Spanish Lode, U. S. Lot 58, beginning on the N. end line of Rough Wrestler N. 65 D. 19′ W. 21.4 feet from Post 3 of Rough Wrestler, thence N. 65 D. 19′ W. 75.4 feet; thence S. 31 D. E. 62.3 feet; thence N. 59 D. E. 42.6 feet to beginning.

With Buckeye Lode, U. S. Lot 88, beginning at Post 4 of Rough Wrestler, thence S. 34 D. 51′ W. 75.4 feet; thence N. 37 D. 30′ E. 88.3 feet; thence N. 65 D. 19′ W. 34.6 feet to beginning.

3. That since the location of said "Rough Wrestler," as aforesaid, the defendant and his predecessors and grantors have done and performed not less than one hundred dollars' worth of labor and improvements on said mining claim during each and every year to the present time.

Wherefore, defendant prays judgment of this court:

First, That he be decreed to be the owner, and in possession and entitled to the possession of the whole of said "Rough Wrestler" mining claim, excepting the conflicts hereinbefore described, as against said plaintiff and all other persons.

Second, For such relief as may be just and equitable and for his costs.

WESTERVELT & SNYDER,
Attorneys for Defendant.

(Duly verified.)

(3) *Stipulation.*

(Title of Court and Cause.)

It is hereby stipulated by the parties hereto, by their respective attorneys, that Findings of Fact, Conclusions of Law and Decree may be entered in this action in favor of said defendant and against said plaintiff for the whole of the

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area in conflict as described in the pleadings herein. And that plaintiff may have a decree for the remainder of its claim not in conflict with the claim of defendant.

Dated November 10th, 1900.

W. M. BRADLEY,
Attorney for Plaintiff.
WESTERVELT & SNYDER,
Attorneys for Defendant.

(4) *Findings.*

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause coming on regularly for trial this 30th day of November, 1900, in open court, W. M. Bradley, Esq., appearing for said plaintiff and Westervelt & Snyder appearing on behalf of said defendant, a stipulation of the parties, by their respective attorneys, having been duly and regularly filed whereby it is agreed that defendant may have judgment for the area in conflict herein, and that plaintiff have judgment for the remainder of its claim, the court having heard the proofs offered in support of the respective parties, and being fully advised in the premises, now makes and files the following

Findings.

1st. That defendant is and at all times herein mentioned was a citizen of the United States.

2d. That on and since the second day of January, 1886, the said defendant, with his predecessors and grantors, was, ever since has been and now is, the owner (subject only to the paramount title of the United States) and in possession and entitled to the possession, by virtue of a discovery of mineral thereon, and a valid location thereof according to law, made on said January 2d, 1886, and of performing during each and every year since said time not less than one hundred dollars' worth of labor and improvements on said mining claim, of that certain mining claim, containing a lode or vein of rock in place, bearing gold, silver and other valuable minerals, known as the "Rough Wrestler," situated in West Mountain Mining District, Salt Lake County, Utah, particularly described as follows, to wit: (Description of the Rough Wrestler, excluding conflict areas as described in answer.)

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3rd. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Maine.

4th. That on the 14th day of May, 1888, the plaintiff's predecessors in interest were, and the plaintiff and its grantors have ever since been the owners, and the plaintiff now is the owner (subject only to the paramount title of the United States) and in possession and entitled to the possession of that certain mine and mining claim containing a lode or vein of rock in place bearing silver and other precious metals, situate in West Mountain Mining District, Salt Lake County, Utah, called the "Alice" lode mining claim, and more particularly described as follows: (Description of Alice claim, excluding conflict area with Rough Wrestler as described in complaint.)

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds —

First. That the defendant is, and plaintiff is not, entitled to the area in conflict in this action.

Second. That defendant is entitled to a patent to the said Rough Wrestler mining claim, as described in these findings.

Third. That plaintiff is entitled to a patent to the said Alice mining claim as described in these findings, except the area in conflict with said Rough Wrestler as therein described.

Let the decree be drawn accordingly.

Done in Open Court this 30th day of November, 1900.

OGDEN HILES, Judge.

(5) *Decree.*

(*Title of Court and Cause.*)

This cause having come on regularly for trial this 30th day of November, 1900, in open Court, pursuant to the stipulation of the parties, and the evidence offered in support of the allegations in the pleadings, and the Court having made and filed its Findings of Fact and Conclusions of Law herein, and the same being sufficient in law to entitle the defendant to recover in this action as to the conflict area, and for plaintiff to recover as to remainder of its claim, now, on motion of Westervelt & Snyder, attorneys for defendant, it is

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Ordered, adjudged and decreed, that the defendant, Thomas Pells, is the owner (subject only to the paramount title of the United States) and in possession and entitled to the possession of that certain mining claim in West Mountain Mining District, Salt Lake County, Utah, to wit: (Description of the Rough Wrestler, excluding conflict area as described in answer.)

And defendant is entitled to a patent to said described tract of land from the United States, and his title to the same is hereby quieted and confirmed; and it is further

Ordered, adjudged and decreed, that plaintiff is the owner (subject only to the paramount title of the United States), lawfully in possession, and entitled to the possession of that portion of the Alice lode mining claim in said West Mountain Mining District, Salt Lake County, Utah, not in conflict with said Rough Wrestler, the same, together with said conflict, being particularly described as follows: (Description of Alice claim, excluding conflict area with Rough Wrestler as described in complaint.)

And that plaintiff's title to said described tract of land is hereby quieted and confirmed.

Done in Open Court this 30th day of November, 1900.

OGDEN HILES,
District Judge.

Attest:
DAVID C. DUNBAR, Clerk,
By F. W. Little, Deputy.

The same pleadings, stipulation, findings and decree, except as to description, were entered in the suit based on the adverse claim filed on behalf of the Sanders No. 2.

II. COAL LAND FORMS.

a. DECLARATORY STATEMENT, AND ACCOMPANYING PAPERS, UNDER PREFERENCE RIGHT.

(1) *Declaration of Intention to Purchase Coal Lands.*

I, M. H., of Salt Lake City and County, State of Utah, do solemnly swear that I am over twenty-one years of age and a citizen of the United States; that I have never, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and I do hereby declare my intention to purchase under the provisions aforesaid, the

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Northeast quarter of Section twenty-four (24), Township 37 South, Range 11 West of the Salt Lake Meridian, of lands subject to sale at the district land office at Salt Lake City, Utah, and that I came into possession of the said tract on the 10th day of September, A. D. 1901, and have ever since remained in actual possession continuously; that I have located and opened a valuable coal mine thereon, and have expended in labor and improvements on said mine the sum of Fifty Dollars, said labor and improvements consisting of a tunnel 4x7x12 feet long, run in a southerly direction, with its mouth on the southeast quarter of said piece of land; and I do solemnly swear that * I am not well acquainted with the character of said described land, and with each and every legal subdivision thereof, but that my duly constituted attorney, B. S., is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; and that his knowledge of said land is such as to enable him to testify understandingly with regard thereto. So help me God.

(Jurat.) M. H.

* When the application is made by the applicant in person, papers (2) and (3) and the remainder of this declaratory statement should be omitted and the following substituted:

"I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver or copper, and there is not, within the limits of said land, to my knowledge, any valuable deposit of gold, silver or copper. So help me God."

(2) *Special Power of Attorney.*

Know all men by these presents: That I, M. H., of Salt Lake City and County, State of Utah, have made, constituted and appointed, and by these presents do make, constitute and appoint B. S., of Salt Lake City and County, State of Utah, my true and lawful attorney, for me and in my name, place and stead, to file with the Register of the United States Land Office at Salt Lake City, Utah, a declaratory statement and affidavit for purchase and to make

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entry and payment for coal lands of the United States, subject to entry under the Revised Statutes of the United States, Title XXXII, Chapter Six, and to take any and all steps that may be usual and necessary to protect and conserve my rights and to procure patent to the Northeast quarter of Section Twenty-four (24) in Township 37 South of Range 11 West of the Salt Lake Meridian.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney shall do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand this 15th day of September, A. D. 1901.

Signed in presence of G. W. M. H.

(Acknowledgment.)

(3) *Non-mineral Affidavit — By Attorney.*

STATE OF UTAH, } ss.
County of Salt Lake. }

I, B. S., being the duly authorized attorney of M. H., do hereby solemnly swear that I am well acquainted with the character of the land embraced in the Northeast quarter of Section Twenty-four (24), Township 37 South of Range 11 West of the Salt Lake Meridian, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver or copper; and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver or copper. So help me God.

(Jurat.) B. S.

(4) *Non-mineral Affidavit — By Two Witnesses.*

STATE OF UTAH, } ss.
County of Salt Lake. }

We, E. D. B. and J. S. S., do solemnly swear that we are well acquainted with the character of the land covered by

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the northeast quarter of Section Twenty-four (24), Township 37 South, Range 11 West of the Salt Lake Meridian, and with each and every legal subdivision thereof, having frequently passed over the same; that our knowledge of said land is such as to enable us to testify understandingly with regard thereto; that said land is chiefly valuable for coal; that there is not, within the limits of said land, to our knowledge, any valuable deposit of gold, silver or copper. So help us God.

(Jurat.)

E. D. B.
J. S. S.

(5) *Final Application to Purchase.*

I, M. H., claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the Northeast quarter of section twenty-four (24), in township 37 South of Range 11 West of the Salt Lake Meridian, subject to sale at the district land office at Salt Lake City, Utah, do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of five hundred dollars, the nature of such improvements being as follows: A tunnel 4x7 feet by 70 feet long, run in a southerly direction, with its mouth on the southeast quarter of said tract of land; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

(Jurat.)

M. H.

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b. CASH OR PRIVATE ENTRY.

(1) *Application to Purchase.*

I, M. H., hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the N. E. quarter of section 24, in Township 37 South of Range 11 West of Salt Lake meridian, in the district of lands subject to sale at the land office at Salt Lake City, Utah, and containing 160 acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, and have declared my intention to become a citizen of the United States, and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that * I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal and is chiefly valuable therefor; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver or copper. So help me God.

(Jurat.) M. H.

* Where applicant is not familiar with character of land, leave out remainder of this application and substitute matter in paper (1), *ante*, this subd. *a*, p. 1407, followed by paper (2), Id.

(2) *Non-mineral Affidavit.*

Same as (4), *ante*, this sub-head, subd. *a*, p. 1408.

(3) *Final Application to Purchase.*

Same as (5), *ante*, this sub-head, subd. *a*, p. 1409.

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